L. J. Lincoln.
1958

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT & BANKRUPTCY COURT

OF MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE LA COUR DES FAILLITES

DE

L'ILE MAURICE.

1862.

VOLUME SECOND.

EDITED BY A. PISTON,
ATTORNEY AT LAW.

MAURITIUS,
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1862.

SUPREME COURT OF MAURITIUS.

His Honor C. FARQUHAR SHAND, L. L. D. &c., Chief Judge.
The Honorable Sir J. E. RÉMONO, First Puisne Judge.
The Honorable N. G. BESTEL, Second Puisne Judge.

The Honorable W. G. DICKSON, Procureur and Advocate General.
S. J. DOUGLAS, Esqre., Substitute Procureur and Advocate General.

H. C. BURY, Esqre., Master.
V. DELAINE, Assistant Master.

F. HERCHENRODER, Esqre., Registrar.
A. PITOT, Assistant Registrar.

VICE-ADMIRALTY COURT.

His Honor C. FARQUHAR SHAND, L. L. D. &c., Chief Justice, Judge.
The Honorable N. G. BESTEL, Judge Surrogate.
The Honorable W. G. DICKSON, Queen's Advocate.
J. H. SLADE, Esqre., Registrar.
J. BOUCHET, Queen's Proctor.
G. A. RITTER, Marshall.

COURT OF BANKRUPTCY.

JUDGES.

THE JUDGES OF THE SUPREME COURT.
J. HERCHENRODER, Esqre., Official Assignee.

COUNSEL (actually practising).

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MAURITIUS

JUDGMENTS OF THE SUPREME AND OTHER COURTS

EDITED BY A. PISTON, ATTORNEY AT LAW.

1862.

Supreme Court.

CESSION DE BIENS.— CONCORDAT,— VOTE DES CRÉANCIERS,— MAJORITÉ REQUISE PAR LA LOI.—AFFIRMATION DES CRÉANCES.—ART. 35 DE L'ORD. No 23 DE 1856.

CESSIO BONORUM,—ARRANGEMENT,- CREDITORS' VOTE,—MAJORITY REQUIRED BY LAW,—AFFIRMATION OF CLAIMS,— SECT. 35 OF ORD. No. 23 of 1856.

CESSIO BONORUM ANGE HARDY.

Before:

His Honor the CHIEF JUDGE.

Hble. H. KŒNIG,—Of Counsel for Petitioner.

A. LEGALL,—Of Counsel for himself.

14th January 1862.

On the 23rd December last, the Court, on the application of the Petitioner, granted an order, in this cause, appointing Mr. Herchenroder, the Official Assignee, to act along with the Creditors' Assignees, and ordered the creditors to meet, on 13th January, to prove their claims. On that day, KŒNIG, of Counsel for the Petitioner, presented to the Court a Concordat, to which the great body of the Creditors were parties, for the arrangement of the affairs of the Insolvent Estate which was very large.

By the *Bilan*, sworn to by the Insolvent, it appeared that his obligations amounted to $508,557,31, of which his assets fell short by a balance of $56,436,29. Counsel moved that, in terms of section 35 of Ordinance No 23 of 1856, there being far more than the statutory amount, in number and value, of the creditors having agreed as to the manner in which the Estate should be managed, the case should at once be brought to a close. The words of the section are as follows:

"Any agreement made pending or after the "*Cessio Bonorum*, between the debtor and "three fourths in number and value of his "creditors, shall, subject to the approval of the "Court, be binding upon all the creditors. If "the Court shall deem such agreement rea "sonable, it shall order the same to be filed "and entered of record on the Registry and "shall further order that the said *Cessio Bo*-"*norum* be discontinued or annulled as the "case may be. Any creditor shall be entitled "to an office copy of the said agreement upon "applying to the Registry and paying for the same."

LEGALL, *for himself*:

We are no parties to this alleged Concordat and I repudiate it. I have never even seen it, and am entirely ignorant of its contents. The case must proceed in terms of law. The creditors must appear and prove their claims and the Estate be wound up under the usual procedure.

CHIEF JUDGE: As you say you have had no opportunity of seeing the concordat, you shall have till to-morrow for this purpose. I have read the document and it appears to me, for the knowledge I already possess of this case, to be a very reasonable mode of arranging these large interests here at stake. This, however, is no more than my present impression which you will have full opportunity of removing to-morrow in argument. I can grant no farther delay, as despatch, in all these cases, is of the utmost importance.

14th January.

CHIEF JUDGE.—As no party wishes to say anything farther, I must now proceed to give a decision on the question which was argued before me yesterday The impression which I had formed on the case has been confirmed by an inspection of the documents, a and

farther consideration of the enactment of the *Cessio Bonorum* or Insolvency Ordinance of 1856.

The policy of the law is to subject the minority of the creditors to the opinion of the majority, where it is of a certain amount, and that for the common benefit of the whole of the parties interested. I am satisfied that the concordat which has been entered into for the purpose of arranging the interests of parties in this case, and which has been homologated at the Bar by the Counsel for almost all the creditors, is one of which the Court ought to approve. I have judicially sufficient knowledge of the position of this Estate to enable me to say so, and therefore, in the circumstances, do not consider it necessary to require the formalities of affidavits to the veracity of the debts of the body of creditors.

Of course, a Judge before he can take a step so decided as that which the Petitioner here calls upon him to take, namely: to order the proceedings to be discontinued or annulled, must be satisfied that he has by law power to do so. On this point, Sect. 35 of the Ordinance appears to be clear.

I shall therefore authorize the Registrar to issue the necessary Order for bringing this process of *Cessio Bonorum* to a close, and I trust that the spirit of forbearance and concession of which the Concordat shew evidence, may find its reward in the successful working out of that arrangement, which will, for the future form the basis of the rights and interests of the parties concerned.

Thereupon the Honorable KŒNIG rose and prayed that the Court be pleased to order that the Petition of *Cessio Bonorum* be annulled, which was done accordingly.

Supreme Court,

AVOUÉ,—NOUVELLE PATENTE PRISE PLUS DE SIX MOIS APRÈS L'ÉCHÉANCE DE LA PRÉCÉDENTE,—ART. 11 DES REGLEMENTS DE LA COUR.

L'avoué qui a négligé de prendre sa patente six mois après l'échéance de la précédente ne peut plus pratiquer sans une autorisation préalable de la Cour.

ATTORNEY,—NEW CERTIFICATE TAKEN MORE THAN SIX MONTHS AFTER THE PROPER TIME,—SECT. 11 OF THE GENERAL RULES OF COURT.

An Attorney who neglects to take out his annual Certificate, for six months, after the proper time, cannot be allowed to practice, without the leave of the Court.

Exparte WILLIAM HEWETSON.

Before the FULL BENCH.

L. ARNAUD,—of Counsel for Applicant.
S. J. DOUGLAS,—Subs. Proc. & Adv. Gral.

4th February 1852.

In this Petition, the applicant William Hewetson set forth that he was admitted an attorney of this Court, on the fifth February 1846 and has since practised in such capacity, except during the years 1854- 5 and 58, when he was absent from the colony; That on his return to Mauritius he took out the annual certificate or license, and practised, without difficulty, as an attorney, until the month of November last, when it was mentionned, in open Court, in the absence of the Petitioner, that according to Rule 11 of the General Rules and Orders of Court, dated 2nd February 1852, he could not be permitted to practice, without leave of the Court; That the petitioner, was under the impression that Rule 17 aforesaid applied only to Attornies who being in the Colony, had neglected or omitted to take out their annual certificate for six months after the time when they ought to have taken out the same, and as such neglect or omission might cause a loss to the Public, it was deemed necessary that such persons should not practise, unless by leave of the Court who always took care to order the previous payment of all arrears due to the Crown.

The Petitioner submitted that his position was different, that he left the Colony, with the knowledge of the Judges, then forming this Court, on account of ill health, on the first occasion, and on the second, on account of urgent private business; and on his return, no difficulty was made, at the Licence Office, to give him the usual certificate or license, which he has, since, regularly taken out every year.

That, as the Court, has as yet, given no positive opinion on this point, the Petitioner is desirous of clearing away any difficulty that may arise in the discharge of his professional duties, and prays that, if Rule 11 applies to the present case, the Court should grant him leave to continue to practise as an Attorney.

Article 11 of the General Rules and Orders of Court is in the following terms:

"If any Attorney neglect to take out his "certificate or license, for six months, after "the time when he ought to have taken out "the same, he shall not be permitted to prac- "tice thereafter, without leave of the Court "previously obtained."

The SUBSTITUTE PROCUREUR AND ADVOCATE GENERAL stated that when the Petitioner's name appeared among the other attornies. in the printed Cause List, some time ago, he had opposed the maintenance of the Petitoner's position as an attorney of this Court, on two grounds:

1o. That he had not then paid a fine of £150. which the Court, so far back as 1857, had imposed upon him, for professional misconduct, and 2o. that he was not in order, under article 11 of the Rules of Court.

The fine has since been paid.

ARNAUD, for the Petitioner, submitted that Rule 11 did not apply to the present case, where the party had been out of the Colony, and where he had duly taken out the License, whenever he was in the Court. The Petitioner himself explained that all the charges brought against him by the Procureur General in 1857, were dismissed excepting one: that charge was for buying a property, at the bar of this Court, for a person notoriously insolvent; that the matter went home to England, and the result was that no one lost a single shilling, by anything he (the Petitioner) had done, in the perhaps too zealous discharge of his professional duty to his employers.

The Court gave Judgment;

We have no wish to rake up the ashes of the dead, or to revive the recollection of proceedings which are long since past and gone. The fine inflicted by this Court, has been paid and the matters connected with that prosecution have therefore come to a conclusion. In regard to the other question, namely: the alleged failure to take out the attorney's licence, it appears to us that the Petitioner is in fault. The words of the law are broad and general. Whenever an attorney has allowed 6 months to elapse after the proper time, without taking out his certificate, he is bound to come before the Court, and give an explanation of the delay, before he can lawfully resume his functions. The Court must then deal with such case according to its circumstances. Following the practice observed in England, in similar cases, the Court grant authority to the Petitioner to resume his practice, as an attorney of this Court on payment of all arrears of duty, and a nominal fine of one pound sterling.

Supreme Court.

JUGEMENS RENDUS EN PAYS ÉTRANGER,—EXÉCUTION A MAURICE DE CEUX RENDUS EN ECOSSE.—ART. 546. C. P. C. 2123, 2128 C. C.

JUDGMENTS OF FOREIGN COURTS OF JUSTICE,—EXECUTION IN THIS COLONY OF THOSE GIVEN IN SCOTLAND.—ART. 546. C. C. P. 2123. 2128 C. C.

Number of Record: 7068.

BARSTOW & ORS. Plaintiffs.
versus
SIR DAVID BARCLAY, Defendant.

Before:
The Honorable SIR J. E. RÉMONO, 1st P.J. and
The Honorable N. G. BESTEL, 2nd P. J.

G. B. COLIN,—Of Counsel for Plaintiffs.
A. J. COLIN,—Plaintiffs' Attorney.
Hon. H. KŒNIG,—of Counsel for Defendant.
W. FINNISS,—Defendant's Attorney.

4th February 1862.

This is a an action directed against the now Sir David William Barclay, by the Plaintiffs, concluding with the prayer that the *Decrees*, made in Scotland, and hereinafter mentioned, be declared executory in this Island and its dependencies: that writs of execution do issue forthwith against the properties, moveable and immoveable, of the Defendant, situate in Mauritius and its Dependencies, (and against his persons) for the principal sum hereafter mentioned, with interest at the legal rate and costs.

The arguments having been closed on the 13th December, the Court took time to consider and now proceeds to deliver its judgment.

The facts of the case, as disclosed by the Declaration, are these:

"Heretofore, to wit: At Edinburgh, on "the 18th day of July 1848 and 6th of March "1850, *two final Decrees of absolvitor* and "for expenses, were made in and by Her "Majesty's Court of Session in Scotland, "under date respectively the days and years "above mentioned, on a certain *action of* "*reduction* then pending in the said Court, "and instituted against Sir Robert Barclay, "of Pierston, Baronet, now deceased, Defen-"dant in the said Court, at the instance of "David William Barclay, now Sir David "William Barclay, the Defendant above "named, *pursuer* in the said Court."

"By which said *Decrees*, the Lords of "Council and Session, being the Judges of "the aforesaid Court *assoilzied simpliciter* "the said Sir Robert Barclay, *Defender*, from "the whole conclusions of the summons and "*actions of reduction*, instituted against him, "before the said Lords, at the instance of "David William Barclay, now Sir David "William Barclay, the Defendant above "named; and did thereby then find the now "late Sir Robert Barclay, the *Defender*, "entitled to expenses; and of the second date "thereof, thereby decerned and ordained the "said David William Barclay, now Sir David "William Barclay, Baronet, the Defendant "above named, to make payment to Messrs. "Shand and Farquhar, the Plaintiffs above "named, (the agents of the said Defender Sir "Robert Barclay, now deceased, and disbur-"sers in the said action) of the sum of "£1880. 7s. 7d. sterling, as the modified

"amount of the said expenses of process, "including interest on various sums of out- "l-y allowed by the said Lords, and of the "further sum of nineteen shillings sterling "as the dues of extracting the *Decrees*.

"As by the said *Decrees* now fully appear "which the Plaintiff's now bring into Court.

"Whereas afterwards, by a deed of *submis "sion, assignation and commission*, made and "signed by John Shand and Arthur Farquhar "above named, to and on behalf of the said "Charles Murray Barstow, the Plaintiff above "named, dated and signed on the thirty first "March and ninth April eighteen hundred and "fifty seven, registered on the 8th Novem "ber 1859, which Plaintiffs bring into Court. "The said Shand and Farquhar did among "other things, assign and convey, to the said "Barstow, all the sums of money, debts, "claims and demands due to the late firm, as "trustee for the said partners, with power to "raise, pursue and recover the same, by all "legal ways and means, as by the said deed "morefully appears."

"The Defendant, after due notice thereof. "and summons to him, not having satisfied "the said final Decrees, this action was "brought."

The pleas of the Defendant are these:

"That this Supreme Court cannot declare "executory, in the Island of Mauritius, the "two alleged *Decrees* mentioned in the De- "claration of the Plaintiffs.

"That the said two alleged *Decrees* are "documents informal and without any authen- "tic character.

"That, at all events, the said alleged *De- "crees* have been irregularly made, and in the "absence of the Defendant or of any agent "or person duly authorized by him.

"That the said alleged *Decrees* have never "been regularly and legally brought to the "knowledge of the Defendant.

"And that, even supposing that the said "documents are of any value, the Defendant "is of right, and by law entitled, to obtain "from the Court a reasonable delay in order "to make him to procure, from England or "from Scotland, such documents and infor- "mation as he may required to enable him to "answer fairly and in a proper manner the "pretentions of the Plaintiffs."

Upon this issue is joined.

In the argument, the Defendant rested his defence chiefly on the *exparte* character of the judgments above mentioned, and of their being informal and without any authentic character, and of their not having been regularly and legally brought to his knowledge. It was also contended that, although the judgments sought to be enforced, in this Island, emanated from one of Her Majesty's Supreme Court, yet, by reason of the difference in the laws of Mauritius and Scotland, the judgments emanating from the Scotch Court are nevertheless to be assimilated to foreign judgments, and, as such, not to be enforced in this Island, unless rendered executory, by this Court, on their being found in strict conformity to the law of this colony. (Art. 546. C. P. C. 2123. 2128 C. C.)

1o. That, on reference to those judgments, their very dates shew that, when made, the Defendant was no longer within the jurisdiction of the Scotch Court. The absent party ought to have been summoned before the Court in Scotland, and allowed the necessary time to appear and defend, either in person or by proxy, and yet, though no such summons has ever been received by the Defendant, the judgments tendered have been obtained against him.

2o. That interests have been added to the costs claimed against the Defendant, and the aggregate amount thereof converted into a new capital productive of interest at five per centum per annum, a practice altogether repugnant to the law of this colony.

These are the main grounds of objection against the *exequatur* prayed for which it was contended ought to be refused.

In support of the demand it has been urged that the soundness of the judgments produced is to be tested by the local law: *fori rei judicatæ*, and not by the law of this land. That, so tested, those judgments are proved by the evidence of the Honorable the Procureur and Advocate General William Gillespie Dickson, a member of the Scotch Bar, of the faculty of Edinburgh, to be in strict accordance with the law of Scotland, and given in a form proper for execution, against the debtor who has gone forth of Scotland.

In this case, the cause and the right of action arose in Scotland. There it was that the action was brought. It has been conducted and adjudicated upon in strict accordance with the law and practice of the Scotch Courts.

JUDGMENT.

In this, no more than in the case of *Cochra ne versus Leishman*, (See Decisions of Supreme Court &a. reported by Adrien Piston; Vol. I. P. 170) has it been pleaded that the judgments, now sought to be enforced in this Island, have been procured by fraud; nor has it been alleged that they are founded in mistake, or that they are bad by the local law, *Fori rei judicatæ*. In this as in the case of *Cochrane*

versus Leishman, just quoted, the exparte character only of the judgments has been urged against the validity of the Scotch judgments.

On this point we find that, upon the face of the several documents tendered, and upon the deposition of the learned Counsel examined on this point, that all the preliminary steps, required for the information of the party no longer within the jurisdiction of the Court of Scotland, and before giving judgment have been strictly complied with; the inference is that such judgments must be enforced and more especially after the partial excution thereof by payment, on the part of Defendant's mandatory in Scotland, who being on the spot, raised no objection, either to the amount of the costs, or to the addition of the interest to the amount of costs, and to the productiveness of interest by that amount.

Judgment for Plaintiffs, in the terms of the Declaration, with Costs.

Supreme Court.

APPEL D'UN JUGEMENT DE LA COUR DES FAILLITES,—PROCÉDURE.

APPEAL FROM A JUDGMENT OF THE COURT OF BANKRUPCY,—PROCEEDINGS.

ALBERT,—Alleged Appellant.

Versus.

HERCHENRODER & Ors, Official and creditors' Assignees of the Bankrupt Estate Albert—Alleged Respondents.

Before:

The Honorable SIR J. E. RÉMOND 1.P.J. and The Honorable N. G. BESTEL 2nd P. J.

A. LIONNET,—of Counsel for Appellant.
C. LABORDE,—Appellant's Attorney.
G. B. COLIN,—of Counsel for Assignees.
F. ROBERT,—Assignees' Attorney.

4th February 1862.

Vide Vol. 1. *Pages* 30 & 156.

On the 6th November 1861, Albert, a Bankrupt, presented a Petition to the Court, praying the latter to review the Judgment of the Judge Commissioner, His. Honor the Chief Judge, and after taking due cognizance of the evidence in the Record in Bankruptcy, upon which such judgment is based, to do justice to the Petitioner.

The Petition sets forth the following grounds in support of the above prayer, viz: "That "on the 18th day of October 1861, the Judge "Commissioner has given judgment whereby "he has awarded to your Petitioner a Certificate of 2nd Class, but not till the expiry of "18 calendar months from the date of such "judgment, and during such 18 months pro-"tection has been withdrawn from Your "Petitioner.

"Your Petitioner feels aggrieved by the "said judgment which, he contends, is uncall-"ed for in its severity, not being warranted "by the conformity of Your Petitioner to the "law of Bankruptcy, or by his conduct as a "trader, either before or after his Bankruptcy, "as proved in evidence before the Judge "Commissioner, and which judgment he (the "Petitioner,) contends, is grounded *upon* "*error* in fact, in as much as the Commissio-"ner has based his said judgment upon con-"clusions drawn from the *evidence* before him, "which conclusions are not supported by "such evidence, and also because the learned "Commissioner has been erroneously led to "believe, and grounds his said judgment upon "the belief, that all the creditors, with the "exception of one, had sanctioned the opposi-"tion made by the Assignees to the allowance "of Petitioner's Certificate, whereas the docu-"ments (unto the Petition annexed,) signed "by a number of the creditors, attest that the "parties signing never in any way sanctioned "such opposition."

The Judge at Chambers, on the same day, 6th November ultimo, ordered that the subject matter of the Petition should be moved in Court. The motion was accordingly made on the 29th of the same month, but could not be entertained before the 13th December ult. when parties were heard upon an objection taken by COLIN, on behalf of the Official and Trade Assignees of the Bankrupt.

The objection goes to the insufficiency of the Petition as an appeal, because 1o.—In no part of Bankrupt's Petition is the word appeal to be found. 2ndly.—Treating this Petition as an appeal (Art.2 Bcy. Ordinance,) the Petition is bad for insufficiency, as it does not disclose the grounds of appeal, thereby depriving the Assignees of the means of meeting the objections against the judgment complained of. 3rdly.—The wording of the Petition clearly shews that the remedy sought for is a *revision* of the judgment, which revision ought to have been applied for to the Judge Commissioner and not to the Court (Art. 155. Bcy, Ord.)

On those grounds this Petition, treated as an appeal, is bad for insufficiency. If its object be the revision of the judgment complained of, the application must be dismissed, for want of jurisdiction in this Court.

In answer LIONNET referred to the text of Art. 3. (Bankruptcy Ordinance) which merely says that. "All appeals from decisions or orders "of the Commissioner shall be brought on "by Petition, motion, or special case."

What are the matters to be setforth in such Petition is no where mentioned, either in our

Colonial Bankruptcy Ordinance, or in the English Act. That it is not *essential* to the validity of an appeal, that the word appeal should appear on the face of the Petition, as long as the intention of the Petitioner to appeal can be gathered from the contents of the Petition, as in this instance.

To this COLIN replied that equipollents can be safely resorted to when there is but one remedy; but when two remedies are granted, as in matters of Bankruptcies, the remedy sought for should be clearly expressed, which is not the case in this instance.

JUDGMENT.

The main grounds of complaint against the Commissioner's judgment is: 1o. The alleged wrong conclusion come to by the learned Commissioner, upon the evidence laid before him, and militating as it does against such conclusion; and 2ndly. the learned Commissioner having been led to believe, and therefore having grounded his judgment upon the belief that all creditors, with exception of one, had sanctioned the opposition made by the Assignees, to the allowance of Petitioner's Certificate, which, it is asserted, was not the case, as shewn by the several documents annexed to the Petition.

Assuming this last mentioned cause to have led to the alleged wrong conclusion complained of, then such conclusion must have been arrived at either on false evidence, or by reason of an improper suppression of evidence, and so far tainted with fraud, in any of which case, says Article 155: (Bankruptcy Ord.) "it "shall and may be lawful for the Court, (of "Bankruptcy) upon the application of the "Bankrupt..... to grant a rehearing of the "matter,..... and upon such rehearing.... "the Court of Bankruptcy shall make such "Order as to the allowance of the Certificate, "or the refusal or suspension thereof as the "justice of the case may require, upon the "like conditions, and having regard to the "like circumstances, so far as the case will "admit, as upon an original hearing."

The application to review the Commissioner's judgment ought therefore to have been made to the Commissioner, and not to the Court, which being without jurisdiction must decline further to entertain his application.

In order that the application be assimilated to, and treated as an appeal, the Petition should have alleged certain grievances remediable by appeal.

True it is that certain grounds are disclosed, by the Petitioner, against the soundness of the, Commissioner's judgment in this case, which, if duly substantiated, might lead to a diffrent conclusion from the one complained of. Those reasons, however, are such only as are allowed by Article 155 (Bcy. Ordinance) for the reviewing of his judgment by the Commissioner; besides, that the Petitioner never contemplated an appeal, is clearly shewn, not only by the grievances complained of, but also by the prayer concluding the Petition, namely:

"Wherefore Your Petitioner prays this Honorable Court" to do what? "to *review* the aforesaid Judgment of the Judge Commissioner and, after taking due cognisance of the evidence in the Record in Bankruptcy, upon which such judgment is based, to do justice to Your Petitioner."

The Court having no power to do so.

This application must be and it is accordingly dismissed with costs.

Supreme Court.

COMMISSION DE CESSION DE PROPRIÉTÉ SUCRIÈRE,—RÉGLEMENT DE COMPTES.

AGENT OF A SUGAR ESTATE,—SETTLEMENT OF ACCOUNTS.

Number of Record: 5949.

WIDOW LAVOQUER.—Plaintiff.
versus
JAMES CANONVILLE.—Defendant.

Before:
His Honor the CHIEF JUDGE and
The Honorable SIR J. E. RÉMONO 1. P. J.

A. LIONNET—of Counsel for Plaintiff.
C. LABORDE—Plaintiff's Attorney.
Hon. H. KŒNIG—of Counsel for Defendant
E. BOULLÉ—Defendant's Attorney.

4th February 1862.

By a Declaration, filed in the Registry of this Court, the 20th of October 1859, Widow Lavoquer has entered an action against James Canonville, of Port Louis, Merchant.

The Plaintiff, Mrs Lavoquer, alleges that, according to an account current, closed on the thirty first day of December 1852, between the said James Canonville and the *Trialet* Estate, one of the proprietors whereof was the Plaintiff, for a fourth, the said account current gives a balance of $20.907.88. or $5226.97. for the fourth accruing to the said Plaintiff, value of the said date of the thirty first day of December 1852.

That James Canonville, Defendant, is thereby indebted to the said Plaintiff in the sum of $5226.97, for the fourth of the balance of the account current aforesaid.

The Plaintiff brings suit against the Defendant and prays Judgment, against the said Defendant, for the sum above mentioned, with interests at twelve per cent, and that Judgment be carried into execution by all legal ways and means.

This Declaration was served to the Defendant.

By a plea filed in the Registry of this Court on the 2nd day of May 1860, by permission of the Court, the Defendant says :

That, out of the sum of $5226.97 c., which forms the balance of the account current mentioned in the Plaintiff's Declaration, the said Defendant has paid to the said Plaintiff, herself personnally and for her account, and on her behalf, several sums of money amounting altogether to the sum of $3681.46; and that the remainder, to wit : the sum of $1545.61. has been, in conformity to and execution of previous agreement between parties, carried to the credit of Julien Langlois, in settlement and deduction of his claims over and against the said Plaintiff.

That the said Plaintiff has no claim to prefer against the said Defendant.

And that even admitting, which is most formally denied, that the said Plaintiff has any claim against the said Defendant, the said Canonville would have to set off with her, for several sums of money to him due by the said Plaintiff, on several accounts, and most especially for her part of one fourth in the purchase money of a cane mill, for the said Estate *Triolet*, sold by Blyth Brothers & Co. whose rights and claims the said Defendant hold.

Therefore the Defendant prays that the said Plaintiff do take nothing by her Declaration, with costs.

This plea was served on the twenty second May 1860.

By permission of the Court the personal examination of Mrs Lavoquer, and oral evidence were permitted and proceeded to.

After having heard Mrs Lavoquer, the several witnesses and the Counsel for the parties, we may arrive at the true position of the said parties and of their respective rights and obligations.

James Canonville was the agent of *Triolet* Estate, belonging, for the three 4ths, to Julien Langlois and one fourth to Mrs Lavoquer. The latter entrusted, as she said, Julien Langlois with the management of her interests in the same Estate. James Canonnille was the agent of *Triolet* Estate, as it is set forth in the Declaration of the Plaintiff, and we can consider *Triolet* Estate as creditor or debtor of Canonville its agent. The account current of Canonville, mentioned in the Declaration, and dated thirty first day of December 1852, is one of the annual accounts of his agency. The result of that account, whether it is on the credit or debit side, must be carried on to the account for the next year and so for each successive year.

The circumstances which gave rise to the difficulties, between parties, are that James Canonville, besides being the agent of *Triolet* Estate, was also the private agent of Mrs Lavoquer, who transacted with him by an intermediate person, his son, who being then a very young man, has thrown great confusion in his mother's affairs, by receiving papers and money, and omitting to deliver them, and departing from the Colony without regulating what he was entrusted to do, and leaving in disorder the very matter which he was charged to settle.

Canonville, by the receipts of Alfred Lavoquer, dated 30th September 1852 and 31st March 1853, shows that he, Alfred Lavoquer, acted in the name of his mother. Fabre, a witness, has received the account and vouchers concerning the private account of Mrs Lavoquer, from A. Lavoquer, and has verified and approved the account, with the exception of a very trifling item, for which vouchers were wanting.

We regret to see in Mrs Lavoquer's interrogatory the incertainty with which she speaks of what passed respecting her business. She does not answer any question in a positive manner. She does not remember even having authorized her son to take any account for her. When she could not attend to her affairs Mr. Ad. Langlois, or his brother, attended to them. She never authorised any of her children to take any documents for her. She admits that the accounts were examined by Mr. Fabre. She does not remember the last person whom she employed for handing over to Fabre the accounts and vouchers to be examined. M. Julien Langlois the father and, after his death, Adolphe Langlois, his son, have done so in several occasions.

Ad. Langlois, as witness changes somewhat the position of things ; he said he was administrator of *Triolet* Estate, as proprietor, after his father's death. He cannot state who examined the accounts However he recollects that Alfred Lavoquer has handed over to him, documents in support of his mother's accounts He, Langlois, entrusted Fabre with examining accounts with Canonville, to see whether they were properly made out and whether the figures were correct ; Mrs Lavoquer used, he thinks, to send her accounts to Mr Robert, her brother Mr. James Canonville was the agent of the Estate *Triolet* for about fifteen months, when the said Langlois was proprietor of

the three fourths of *Triolet*. A. Langlois declares that the private accounts of the proprietors of *Triolet* Estate sometimes shewed a balance in their favor, sometimes against them. From this evidence of A. Langlois we have not any satisfactory explanation respecting Mrs Lavoquer's claim.

Julien Fabre determines what took place, in his knowledge, regarding Mrs Lavoquer. He first declares that he was charged, by Alfred Lavoquer, to verify the accounts of his mother in 1855. He found the accounts correct, with the exception of a few documents which were among some bundles of paper given to him by M. Ad. Langlois. A balance against *Triolet* Estate was due by that Estate. Canonville has mortgage claims which did not appear in the first account. When he was engaged, examining those accounts, Alfred Lavoquer asked him to examine his mother's account, saying that he would find the vouchers in support of them, among A. Langlois papers. Those vouchers are certainly those received by Lavoquer, from Canonville, and of which Mrs. Lavoquer cannot say what became of them. Fabre repeated the very words of Alfred Lavoquer, which prove that he could not have received those vouchers except from Canonville; and in presence of Canonville, he, Alfred Lavoquer, handed them to Fabre who adds that Canonville then, without hesitation, shewed him his books. Fabre declares that he received, for his trouble, three hundred and fifty dollars, in a promissory note subscribed by A. Langlois and endorsed by Mrs Lavoquer. Fabre delivered the accounts of Mrs. Lavoquer to A. Langlois, who had handed them to him. The accounts received by Fabre, from Alfred Lavoquer, were the private accounts of his mother. The accounts, as owner of one fourth of *Triolet* Estate, were comprised in the accounts of the Estate.

Chauvineau, cashier of the Commercial Bank, swears to the truth of an account of this Establishment, with Canonville, mentioning several sums, paid to Mr Lavoquer in 1852 and amounting to $1330.58; and Golamseen Bacosse, cashier of Canonville, declares that Alfred Lavoquer has been paid of several sums of money, on orders, signed by Mrs. Lavoquer, and upon Alfred Lavoquer's receipts. The same witness, consulting his books, detailed, the different sums, paid by Canonville to Mrs. Lavoquer, by the hands of her son.

The evidence of Fabre minutely explai what is consistent by common sense.

Canonville was the agent of *Triolet*; Langlois was the proprietor of that Estate, for three fourths, and Mrs. Lavoquer for o fourth. An account for *Triolet* w k Canonville, and submitted to the pro The balance of that account was of the year, brought to the n w a new year, and at the same tim accounted to Langlois and Mrs. Lavoquer for their personal expenses, and the amount, figuring in the debit side of such private account, was naturally deducted from the balance of any, on the credit side of the *Triolet* account; and any person can easily understand that system of accounts. As regards the claim, now made, of the sum of $5226.98¢, balance in favor of the Plaintiff, in the account of *Triolet*, Canonville answers that he has paid to Mrs. Lavoquer $3681.46 and that the remainder, to wit: the sum of $1545, 51¢ has been carried to the credit of Julien Langlois, in deduction of his claim, against Mrs. Lavoquer, for the purchase, among other things, of a Sugar Mill for *Triolet*, as she was answearable, for one fourth, as proprietor, to that extent, of the debt incurred by Langlois for the Estate.

Canonville has justified his assertions and proved that the Plaintiff has no claim against him.

For these reasons the Court dismisses the Plaintiff's action with costs.

Supreme Court.

COMMISSIONNAIRE D'UNE PROPRIÉTÉ SUCRIÈRE,—RÈGLEMENT DE COMPTES.

AGENT OF A SUGAR ESTATE,—SETTLEMENT OF ACCOUNTS.

Number of Record. 5127.

[LANGLOIS, Plaintiff.

Versus.

CANONVILLE, Defendant.

Before:
His Honor the CHIEF JUDGE, and
The Honorable N. G. BESTEL, 2nd P. J.

A. LIONNET,—Of Counsel for Plaintiff.
C. LABORDE,—Plaintiff's Attorney.
[illegible] H. KŒNIG.—Of Counsel for Defen-
[illegible]OULLÉ,—Defendant's attorney. [dant.

4th February 1862.

[illegible] action, on the part of Plaintiff, [illegible]e revision of an account, furnished by [illegible]dant to Plaintiff, shewing a large balance [illegible]nst the latter, value of 31st Dec. 1852.

[illegible]far from admitting the existence of any [illegible]ch [illegible] [illegible]f the Defendant, the [illegible] contrary that it is the [illegible] [illegible]ted to him, the said [illegible]ntiff. [illegible] $ 31,148, 29, with in-[illegible] [illegible]er annum, from the [illegible]852.

In support of that assertion the Plaintiff alleges that the account, furnished by Canonville the Defendant, carries to his debit the sum of $20,960 for the promissory notes in the Declaration setforth, which were paid by him the Plaintiff, on their severally becoming due, and not by the Defendant.

Whereupon it is prayed that the amount of such promissory notes be withdrawn from the debit side of the Defendant's account, as well as a sum of $500, alleged by Defendant to have been paid by him to himself, for a certain transaction with one Durocher and wife, on the 31st December 1852, and to be carried to the credit of Plaintiff.

The Plaintiff further alleges that the balance stated in the account furnished by Defendant (viz:) $ 9,688, 29, added to the $20.960, amount of the bills so paid by him, the said Plaintiff, as aforesaid, and to the sum of $500 above mentioned, gives a total sum of $31,148, 20 which, it is alleged, is the balance in favor of Plaintiff, value of the 31st December 1852, for which total sum of $31,148.29. Judgment is prayed for by Plaintiff

The Defendant met this demand by the following pleas:

1o "That, as to the balance of $9,688.29¢, mentioned in the Plaintiff's Declaration, the same has been brought to and included in the account as well as of the said Plaintiff, as of the Estate of the late Julien Langlois, whose property was bought by him, and that the final result is that the said Defendant remained a creditor, in a large balance, of which the settlement has been the object of an agreement under private signatures, entered into by and between the said Plaintiff and Defendant, on the 17th March 1855, registered on 20th August 1856.

"That, as to the sum of $20,960, amount of the several promissory notes mentioned in the said Plaintiff's Declaration, the same has been deducted from the amount of the claims of the said Defendant over and against the said Plaintiff, and that the result is, as already above stated, that the said Defendant remained a creditor in a large balance, the settlement whereof forms the object of the private agreement aforementioned, entered into by and between the said Plaintiff and Defendant, on the 17th day of March, in the year of Our Lord 1855.

"That, as to the sum of $ 500, concerning Durocher's debt, it has been placed at the debit side of the said account, by virtue of a special order, from the said Plaintiff, and of his letter to the said Durocher, bearing date the 15th day of December 1852.

"And the said Defendant further says that, far from being indebted to the said Plaintiff in any sum of money whatsoever, he is, on the contrary, a creditor to the said Plaintiff, in large sums of money, for the recovery of which he will take such steps as he will think fit and proper in due time and course of law.

"Therefore the Defendant prays that the said Plaintiff's action be dismissed with costs.

Lionnet, of Counsel for Plaintiff, opened his case and examined the Defendant Canonville, who, in his personal interrogatory, acknowledges the bills in the Declaration set forth, and admits their having been withdrawn from circulation by the Plaintiff who, to this end, had the disposal of the crop of 1853. But at the same time states that those bills to the amount of $20,960, which had been negociated with his endorsements, had been deducted from his account, as fast and as soon as they had been so withdrawn, either by Plaintiff, or, if withdrawn by Defendant, as soon as the latter had been reimbursed the amount of such bills by Plaintiff.

That the Plaintiff succeeded his father J. Langlois, in the Estate *Triolet* for two fourths by purchase, on the 30th Avril 1852, and for another fourth, also by purchase, by a private agreement, between parties, of the year 1852, and deposited with notary Lienard and his colleague, on the 13th August 1352; that Julien Langlois died on the 13th May 1852, after whose death the Plaintiff, who managed the affairs of the Estate, drew upon him, Canonville, to the extent of 18 or $20,000. On closing his accounts on the 31st December 1852, as requested by Langlois, he, as a matter of course, transferred to the debit of the Plaintiff's Estate, the $ 9688. 29, standing to the credit of the said Estate, in part payment of his advances.

Such tranafer, it was contended by Plaintiff, was illegal; having accepted the succession of his father under benefit of inventory, the Plaintiff is not personally liable for the debts of his father, either in toto or beyond the amount of the assets of the Estate left by deceased.

The answer to this objection is that the Plaintiff is not charged with the sum of $9688. 29, in his representative character of *heir* to his father, but in his character of *purchaser* of the ¾ of the Estate *Triolet*.

The purchase price of the ¼ of the Estate is made payable thus: "Outre les charges et conditions sus exprimées, la présente vente est faite moyennant la somme de $100,000, sur laquelle somme M. Adolphe Langlois prélevera celle nécessaire pour payer toutes les dettes généralement quelconques du vendeur, en se réservant toutefois la faculté d'obtenir termes et délais des créanciers de M. Langlois.

pourvu qu'il fasse ensorte que ce dernier ne soit aucunement inquiété ni recherché au sujet de ces dettes.

" A l'effet de quoi il est fait toute délégation nécessaire aux dits créanciers."

(Deed of sale 30th April 1852.)

The third and last fourth of *Triolet* Estate was sold, in 1852, to Plaintiff, by his father Julien Langlois, for the sum of $50,000, the price being made payable " à M. Jn. Langlois (Vendor) qui l'accepte, ou à tous autres étant à ses droits, ou fondés de ses pouvoirs, en six termes égaux de $8,833, 33, chacun, d'année en année, à commencer du 1er Mai 1862 pour finir le 1er Mai 1867 (Acte de dépot. 13 Août 1855.)

It is upon the strength of the express undertaking by Plaintiff, in the deed of sale of the 30th April 1852, to pay the vendor's debts, to the amount of $100,000, that the Defendant has carried to the debit of Plaintiff's account the $9688,29 above mentioned, and originally standing to the credit of the Estate.

Moreover, was it said, the objections now raised by the Plaintiff have been finally settled between parties,

In a writing, under private signatures, between parties, under date the 17th March 1855, we read that: " M. Canonville se présente comme créancier d'une somme du $26,000 environ, pour balance de ses comptes, tant avec feu M. Jn. Langlois qu'avec M. Adolphe Langlois et Madame Veuve Lavoquer. M. A. Langlois n'accepte pas le chiffre de cette balance. Il se réserve au contraire expressément le droit de vérifier, d'examiner et de débattre tous les comptes dont elle est le résultat.

" Néanmoins, et sous le mérite de cette réserve, les parties sont demeurées d'accord de faire, dès à présent, et provisoirement, le réglement de la balance, aux termes et conditions suivantes :"

It is immediately stated, in the following section, that any balance, which might be found due by Plaintiff to Canonville, shall be paid to the latter in five equal instalments, beginning at the end of the year 1855 and at the end of the years 1856—1857—1858 with interests at twelve per cent per annum.

The Plaintiff Adolphe Langlois undertakes to examine the accounts immediately, upon his being furnished with them.

In case the figure of the balance should be lower than the one claimed by Canonville, it is agreed that the reduction should operate on the last instalment of $5000 principal, without prejudice to the interest.

In pursuance of this agreement, on the Plaintiff being furnished with the account of Defendant, and the vouchers in support thereof, Fabre, an accountant, was charged, by the Plaintiff, to examine that amount. The result of such examination was, on the account of Canonville with the succession Jn. Langlois, to 25th September 1853, a balance in favor of Canonville against the Estate of $55,235,60. The account of Canonville with A. Langlois shews in favor of the latter a balance of $72,226,63.

Now the claim of Canonville, in principal and interest, against the Plaintiff A. Langlois, in his character of purchaser and owner of the three fourths of *Triolet* Estate, was originally, on the 25th May 1855...		$ 106,411,20
To which sum is to be added the sum due in principal and interest, at the same date, to Canonville, by Mrs. Lavoquer, owner of the other fourth of the same Estate, and the payment which was guaranteed by Langlois (See precedent agreement of 17th March 1855).....		$ 3,490,97
Giving a total balance in favor of Canonville of		$ 109,902,17
From which is to be deducted :		
1o. Balance in favor of Langlois..	$ 72,226,63	
2o. Interest on the above debt....	$ 14,445,33	
	$ 86,671,96	
Minus; for the ¾ of $ 3,262,74 being the amount of supplementary account of the Estate *Triolet*.....	$ 2,447,06	
		$ 84,224,90
Leaving for Canonville a balance of		$ 25,677,27

Such is the balance established in favor of Defendant, by Canonville, and found correct by Fabre, the accountant instructed by Langlois, the Plaintiff, to sift and establish the accounts between parties.

That the issues, raised in this action, were finally settled by the verification made by Fabre at the special request of Plaintiff has been denied. In support of this denial we have been referred to the very wording of the agreement necessarily implying the reverse of finality.

JUDGMENT.

True it is that the agreement call into question the figure of the claim set up by Canonville. But that something was due to Canonville, by Plaintiff, as purchaser and owner of the ¾ of the Estate *Triolet*, and as guarantee of the advances made to Mrs Lavoquer, for her ¼ of the Estate, is necessarily implied.

It was for the purpose of determining the exact amount which might be due to Canonville that the agreement above mentioned was resorted to.—This account once accurately ascertained, the mode of payment is next considered, and it was agreed that any balance, found due to Canonville, should be paid in 5 instalments, with interest at 12 p. o|o per annum, and that in case the figure of the balance be lower than the one set up by Canonville, the reduction should operate on the last instalments above mentioned, without prejudice to interest,

Has that balance been ascertained? Undoubtedly, and in the most satisfactory manner. The accountant, appointed by the Plaintiff, has gone through the whole of the items comprised in Canonville's account. This account was a general one and embraced advances made by Julien Langlois, before and after the sale to his son, those made to the son, after purchase from his father, and after the decease of the latter, for the working of the whole Estate, including Mrs Lavoquer's fourth in the Estate.

This account was converted into so many separate accounts, and yet, as already observed, the result arrived at, by the accountant, confirms the correctness of the balance claimed by Canonville, within a couple of thousand dollars, as to which the accountant entertained some doubts. Attaching no importance to this trifling difference, the Defendant at once adopted balance as settled by the Plaintiff's own accountant. Under such circumstances, and after the great care bestowed by the accountant upon the verification of Canonville's accounts, with the several parties interested, at the various dates, a new verification would be, on the part of the Court, a mere wast of time, exposing parties to needless costs.

The revision prayed for must therefore be and is accordingly refused.

Whether the Plaintiff is liable for the payment of the whole debt, and whether Canonville was justified in applying the balance of $9688,19 towards the payment of the sum due to him for advances, the Court has no doubt that he was justified in so doing, the Plaintiff being chargeable for the advances made to him, first, as purchaser of his father's interest on the Estate, secondly, as owner of that interest, and thirdly, as guarantee for Mrs. Lavoquer's share of the debt, to the amount of her one fourth in the Estate, to the working of which the advances made by Canonville have been applied.

The Plaint mentions the sum of $500 comprehending Durocher's debt. Canonville not insisting upon this part of his claim, the Court has merely to note the Defendant's abandonment of this sum.

Demand dismissed with costs.

Supreme Court.

COMMISSIONNAIRE D'UNE PROPRIÉTÉ SUCRIÈRE,—RÈGLEMENT DE COMPTES.

AGENT OF A SUGAR ESTATE,—SETTLEMENT OF ACCOUNTS.

Number of Record: 7039.

LANGLOIS, Plaintiff.
Versus.
CANONVILLE, Defendant.

Before:
His Honor the CHIEF JUDGE, and
The Honorable N. G. BESTEL, 2nd P. J.

A. LIONNET,—Of Counsel for Plaintiff.
C. LABORDE,—Plaintiff's Attorney.
Hon. H. KŒNIG,—Of Counsel for Defendant.
E. BOULLÉ,—Defendant's attorney.

4th February 1862.

This is an action which, as stated at the Bar, necessarily follows the fate of the action between the same parties. (No. of Record 5127. Vide Suprà Page 8.)

On this last action, Canonville having been found a creditor of Langlois, in a large sum of money, the action was dismissed with costs.

In the present case, payment of the sum of $45,351,08 being the alleged amount of sundry bills, alleged to have been paid by the Plaintiff, with interest at 12 o|o per annum, from the respective dates in the Declaration mentioned, is claimed by Langlois the Plaintiff. In the account, drawn up between parties by Fabre, and produced in evidence in the preceding case, the Bills, of which the amount is claimed in this action, have all been taken into account, and the Defendant found to be debtor in the considerable sum mentioned in the judgment just delivered between the same parties.

The consequence of this finding is the dismissal of this action with costs.

Supreme Court.

INJONCTION DE LA COUR,—EMPRISONNEMENT POUR DÉSOBÉISSANCE,—C. C. ART. 2063, C. DE P. C. ART. 126.

La Cour, avant d'ordonner l'emprisonnement d'une partie, pour désobéissance à l'un de ses

ordres, doit s'assurer que cette désobéissance est volontaire et préméditée.

INJUNCTION OF COURT,—ATTACHMENT FOR BREACH THEREOF,—C. C. ART. 2063,—C. DE P. C. ART. 126.

Before the Court will grant an attachment for alledged contempt of Court and breach of Injunction, it must be quite satisfied, by clear evidence, that there has been a real contempt of Court and wilful breach of Injunction

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Number of Record: 7439.

SICARD, Plaintiff.
versus
LEMERLE, Defendant.

Before:

His Honor the CHIEF JUDGE, and
The Honorable SIR J. E. RÉMOND, 1 P. J.

S. J. DOUGLAS,—Of Counsel for Plaintiff.
J. H. SLADE,—Plaintiff's Attorney.
G. B. COLIN,—Of Counsel for Defendant.
A. J. COLIN,—Defendant's Attorney.

4th February 1862.

This was an application for an attachment of the person of Lemerle, for contempt of Court, in respect he had violated, as was alleged, an Injunction, granted by the Judge at Chambers, the Honorable Sir Ed. Rémond, on 31st October last.

The Injunction was in these terms:

"Victoria, &a. To Volcy Lemerle, of the District of Moka, at the place called "Les Pailles," and any other person.

"Greeting.

"We do strictly enjoin and command you, the said Volcy Lemerle or any other person, that you do from henceforth, altogether and absolutely, abstain from breaking down, or in any way injuring a certain dam, placed on the certain water course called the Rivière Sèche, leading water to the flour mill of Daubin Sicard, or from in any way troubling or hindering the said Daubin Sicard, in the quiet and peaceable enjoyment of the water so leading to his mill, from the river or water course aforesaid, until our said Court shall make order to the contrary.

"For the Registrar.

(Signed) "F. HERCHENRODER.

"Chief Clerk."

It appeared that the parties were riverains, on the opposite sides of the stream called "Rivière Sèche," at "Les Pailles," in the District of Moka. Sicard, or his predecessor, had built a dam on the stream, and had diverted the great body of the water to turn a mill on his property. His right to do so having been called in question by Lemerle, Sicard resorted to the Land Court, (TRIBUNAL TERRIER) and, after various proceedings, ultimately obtained the following judgment:

"That Sicard's prayer, in so far as the use and enjoyment of the water, which had been appropriated by him, by means of the dam, as in the said Petition mentioned, might in future be used by him, should be granted, provisionally, and until it might be required for purpose of more general utility;— and subject always to the same grant being cancelled, or in any wise altered by the Court, as to the Court might hereafter seem to be necessary or expedient, upon any motion to be made to this Court, at the instance of any party interested; and subject particularly to the conditions that the canal, dam, and race of the said mill remain as they were at the date of the said Petition, that is to say, that they be neither deepened nor widened, and also that Petitioner do, for the purpose of washing his wheat, etc., use other water than the water of the said stream, and that, in the event of the said Petitioner using the water of the said stream for the purpose of washing his wheat, he be found to return the same water to the said stream, throughly purified, by filtration."

In the affidavits, on both sides, made with respect to the present motion for attachment of the person of Lemerle, considerable conflict of evidence existed. That Lemerle, had, after the Injunction, interferred with the run of water, at the place in question, was not denied, but he maintained, in his affidavit, that he had merely ordered his servants to remove the mud with which Sicard had, shortly before, closed up an opening, of two or three feet in breadth, between the dam and his (Lemerle's) land, and that he had taken good care "not to touch or injure the dam, in any way."

These statements were borne out by the affidavits of several persons of great respectability, namely: Felix Target, Armand Deschiens, Arthur Edwards and Ernest Merle. On the other hand, certain drawings and plans of the locality, and the stream, &a., made by professionnal parties, employed in the previous judicial proceedings, and certain statements of Lemerle himself, in those proceedings, were relied upon by Sicard, as positively contradicting and inconsistent with the affidavits just referred to.

DOUGLAS for Sicard, contented: A plain breach of Injunction of the Supreme Court has been fully established. It was openly and

wantonly gone about, a gross contempt of the Court and of the law was committed, which requires exemplary punishment. Every Court of Justice has the inherent power of vindicating all breaches of its orders by suitable penalties, such as imprisonment or fine. This Court exercises, by its constitution, all the power and authority of the Court of Equity, in England. Injunctions are now of every day's occurrence, in all of these Courts, though, formerly, Courts of Common Law did not employ them, and attachment of the person is always granted when the case is established. Injunctions have been well known in Mauritius, since 1852. The counter affidavits here are undoubtedly those of respectable persons, but they are wrong, as regards the time to which they speak. There lies the mistake. The pleadings and plans of Lemerle, in the other Courts, are inconsistent with these affidavits and demonstrate that these latter cannot be true.

COLIN for Lemerle: With all due respect, I do not admit the power of this Court to proceed by way of Injunction, at least, if that involves the power of the Court to send persons to Jail, who commit breaches of Injunctions. The cases in which imprisonment is legal are enumerated in Article 2053, and the preceding articles of the C. C., and no "formal law" has added this to the number. See also Article 126. C. C. P. and TOULLIER, 2, No. 219. CARRÉ 16. 54. PIGEOT. 6. B. 2. page 4. No doubt this Court exercise all the powers of Courts of Equity, in England, but, by the Order in Council of October 1851, that is limited to cases *where no legal remedy is provided by the Law of Mauritius* (Article 3). The Law of the Colony provides ample remedies by action of damages, or by a criminal prosecution for such a case as is here alleged, but in no respect proved. In point of fact, Lemerle never disobeyed the Injunction. It never entered into his mind to be guilty of such a thing or to shew the remotest disrespect for the Court, what he really did do is candidly stated in his affidavit, and his narrative is fully supported by the other gentlemen, quite disinterested and quite incapable of falsehood.

JUDGMENT.

The writ of Injunction, as might be expected, has been in use, in Mauritius, since the establishment of the Supreme Court, on its present basis, in 1852. It is obvious that every Court must possess the power of protecting its own writs, by a suitable penalty against those who wilfully infringe them. It is a fundamental Rule, as to jurisdiction and powers, in all Courts of Justice, that *omnia concedi videntur sine quibus explicari nequit.* There can be no doubt, therefore, that, were we satisfied that there had been here a deliberate contempt of the order of the Law, it would have been our duty to inflict a suitable punishment, which would propably have been by attachment of the person of Lemerle. But before taking such a step, affecting the personal liberty of a party, a Court of justice must have sure grounds to go upon.

It must, not only, have reason to suspect that the party has been playing at the hazardous game of disobeying the order of a Court of law, issued for the protection of his neighbour's legal rights, but the judges must have that amount of legal evidence which leaves no reasonable doubt on the mind, that he actually has wilfully infringed the Injunction:

We are of opinion that such clear and decisive proof has not been submitted to us, in this case. Lemerle would have acted a wiser and more prudent part, if he had religiously abstained from interfering with the locality in question, till his legal rights had been ascertained, in due course of law; but in dertermining the only issue which is now before us viz: has it been proved that a contempt of Court, by breach of Injunction, has been committed, we say that we are not satisfied with the evidence in support of the charge.

The Rule must, therefore, be discharged, but without costs.

Supreme Court.

CONTRAINTE PAR CORPS,—ORD. No. 23 DE 1856.

CAPTION OF THE BODY,—ORD. No. 23 OF 1856.

Number of Record: 8067.

SCOTT & Co. Plaintiffs
Versus.
ROUILLARD & ORS. Defendants.

Before:
His Honor the CHIEF JUDGE and
The Honorable SIR J. E. REMONO 1. P. J.

CAUSE UNDEFENDED.

G. B. COLIN,—of Counsel for Plaintiffs.
E. DUCRAY,—Plaintiffs' Attorney.

Where an obligation, in the following terms, was added at the bottom of an account of furnishings to a sugar Estate, the Court held that, under the Ordinance No. 23 of 1856, caption of the body limited to 3 years must issue.

The obligation was as follows:

"Approuvé le compte ci joint s'élevant à la somme de sept cent quarante et une piastres. Accepté à payer au domicile de MM. B. & Co. à la fin de Janvier prochain.

"A MM. D. & Co. où ordre.

"Port Louis le 3 Octobre 1862.

"E. L.

"Nous garantissons notre signature en capital et intérêts jusqu'à parfait paiement.

"4 Février 1862.

"D. &Co."

Supreme Court.

COURS D'EAU,—TITRES DE PROPRIÉTÉ,—PREUVE ÉCRITE ET PAR TÉMOINS.

RUN OF WATER,—TITLES OF OWNERSHIP,—DOCUMENTARY AND ORAL EVIDENCE.

Number of Record : 4284.

DUBOIS, Plaintiff.

Versus.

SAÏSSE, Defendant.

Before :

The Honorable SIR J. E. RÉMOND, 1 P. J. and The Honorable N. G. BESTEL, 2nd P. J.

G. B. COLIN,—Of Counsel for Plaintiff.
E. BOULLÉ,—Plaintiff's Attorney.
L. ARNAUD,—Of Counsel for Defendant.
A. CHAUVET,—Defendant's Attorney.

4th February 1862.

Plaintiff and Defendant, proprietors in the District of Plaines Wilhems, claim before this Court the exclusive ownership of a share of water, furnished by a canal running from the Plaintiff's premises to the Defendant's.

Parties appeared on the tenth of March 1858, before the District Magistrate of Plaines Wilhems, upon the question of possession, which was decided in favor of Saïsse, who was ordered to be restored in the enjoyment of the run of water, which he has enjoyed from the 27th day of November 1836 to the 18th day of February 1858, with costs.

The same parties appear before this Court, upon the question of the right of property to the share of water, the possession of which was submitted to the District Magistrate as above mentioned.

The Plaintiff alleges that, by a certain toleration, the said water was allowed to run on the Defendant's premises.

The Defendant maintains that the said share of water, having been for a time, beyond the memory of man, always running on the Estate of Defendant, and been owned by the said Defendant and all the previous owners of the same Estate, now belongs to him, the Defendant, as the lawful and rightful owner of the said share of water and not by a certain toleration.

Dubois, the Plaintiff, presents, as evidence, the titles of his property of twenty eight acres of land, in the District of Plaines Wilhems, traced back, for three acres of land, from 1753 to 24 Brumaire an 4, and for 25 acres of land, from 1785 to 1st August 1856.

One of these titles, dated the 28th January 1845, containing sale by Em. Mariette to Auger, mentions the enjoyment of a prise d'eau, in a clause which runs as follows :

"Est comprise en la présente vente la jouissance, en toute propriété, d'une prise d'eau alimentée par un canal commun avec les propriétés Lebel et Bouchet, et dont la division est à l'angle du terrain présentement vendu, lequel est, dans toute sa longueur, traversé par la portion de la dite prise d'eau revenant à la propriété *Lebel*. Auger supportera cette servitude, ainsi que les vendeurs en étaient eux-mêmes tenus, étant bien entendu que M. Mariette se réserve le droit à une prise d'eau, à prendre du trop plein du bassin qui existe devant la maison, auquel bassin est adapté à cet effet, un tuyau de plomb, servant de conduite, que M. Mariette entretiendra à ses frais, ainsi que le réservoir et les autres accessoires."

In a deed of exchange, between Mrs. Folliard and Mrs. Rampal, on the 11th of February 1856, we see the sale of the property of the eight acres of land, and the following stipulation :

"Ensemble les autres appartenances, et principalement la jouissance, en toute propriété, d'une prise d'eau alimentée par un canal commun avec les propriétés *Lebel* et *Bouchet*, et dont la division est à l'angle du terrain habitation ci dessus designé, lequel est traversé, dans toute sa longueur, par la portion de la dite prise d'eau revenant à la propriété Lebel, servitude qui devra être supportée par M. Auguste Dubois, ainsi que Mme. Rampal y était elle même tenue."

In the other titles of the property alluded to by Dubois, we find no mention of a prise d'eau upon the plot of ground successively transmitted to Dubois.

Saïsse, the Defendant, justifies, by title, that he is, from the eleventh of May 1853 up to December 1842, the successive proprietor of the plot of ground having the enjoyment of the prise d'eau in dispute.

A deed, dated of February 1792, produced by Saïsse, shows that Laurent and Fleuriau, on selling to Auguste Lebel 27½ acres of land,

in the District of Plaines Wilhems, took the obligation: "De fournir à l'acquéreur, ses hoirs et ayant cause, une prise d'eau sur la portion du terrain présentement vendue, à ses frais et dépens."

Saïsse also produces a deed, drawn up by Deroullede notary public, the third of January 1830, containing the sale of the plot of ground of 27½ acres, wherein it is stipulated, by Mrs. Larmand, vendor, that. "Est aussi comprise en la présente vente une prise d'eau d'un pouce dont le canal existe sur ladite portion de terrain."

From the evidence of Saïsse, it is proved that he, Saïsse, has the right of Philip Auguste Lebel; moreover, in the evidence presented by Dubois himself, we ascertain that fact, which is also established by Em. Mariette, a preceding proprietor of the plot of land, now belonging to Dubois. Mariette, the vendor to Auger, who afterwards sold to Mrs. Foliard, stipulates that the purchaser Auger "supportera la servitude, ainsi que les vendeurs en étaient eux-mêmes tenus" in favor of Lebel.

These written evidences, presented by both parties, prove an anterior right, on behalf of Lebel and his *ayant droit*, in the canal, for which a servitude was created upon the land of Dubois and his predecessors; Mariette, in the deed of sale, has positively specified that servitude and imposed upon his successors the obligation of supporting it.

The witnesses heard in this case have not and could not determine the right of the parties to the canal above mentioned. They only relate what took place, before their eyes, that is to say, the passage of the canal from the land of Dubois to the property of Saïsse.

Gustave Henry declares that Dubois takes water from the canal by means of a small leaden pipe.

Hortensia Picherat says the same thing and adds that Saïsse has broken the pipe. The witness states that the canal enters Dubois' land, at one corner, passes through a small pond in the gardens, and then goes to Saïsse by the opposite corner.

Amédée Hugnin also establishes the passage of the canal, through Dubois to Saïsse, by a division into parts of the canal des Plaines Wilhems, one for Bouchet now Brownrigg, and the other going to Saïsse.

Brownrigg traced the direction of his canal, and of another passing through the land of Dubois.

Louis Reaux, an old inhabitant at Plaines Wilhems, states that he has known since 1820, Dubois' land, formerly belonging to Garry. Saïsse's land in 1820, belonged to Lebel The canal crossed Dubois, land, at that time, and came to Lebel, Garry now Dubois, in that time used the water and, except what he required for his wants, the whole of the water went on to Lebel, who had constructed three bassins to recover the water; the state of things continued down to Bourrelly's time. A puisard watered the garden of Garry.

Delphine Finette knows, since 40 years, Saïsse's land, in Plaines Wilhems, and also the canal bringing water into the said land. She was in the service of Bourrelly. The water, which reaches Saïsse, came from the main road, crosses Dubois' land, and it was so during the whole of her stay there, that is, until 1840.

Those oral evidences, we repeat, have not spoken respecting the rights of property of the canal in dispute; they only trace the course of the water.

We have however a witness, M. E. Maritte, who represents things in a different manner. He declares that, in 1842, he was proprietor of Dubois' land, at Plaines Wilhems. The canal running through that land is made by the hand of men, in masonry. This canal did not go into Saisse's land. He, Mariette, took from the canal as much water as he required, and sent the *surplus* to his balisage. He used that water without let or trouble. He sold the water "en toute propriété." He purchased from Bourelly and sold to Auger.

The evidence of M. Mariette proves only a want of memory, because it is contradicted by the insertion, made in his deed of sale to Auger, in which he sold a "prise d'eau alimentée par un canal commun avec les propriétés Lebel et Bouchet," and he therein imposes, to his purchaser Auger "de supporter la servitude en faveur des ayant droit de Lebel, ainsi que les vendeurs en étaient eux mêmes tenus." It is proved, by all the documentary evidence produced, that the right of Lebel, or his *ayant droit*, to the property of the share of water alluded to, dates as far back at least as third February 1792, whilst the existence of the alleged right of Dubois, to the same water, is only quoted by Mariette, in his sale to Auger, of the 27th January 1845, in which however he also speaks of the anterior right of the *ayant droit* de Lebel.

This analysis of the documentary evidence clearly shews the ownership of the canal to be in Saisse; and lest it should be inferred that, in the strict exercice of his right, Saisse might be tempted to deprive Dubois of the advantage, hitherto enjoyed by him, of the use of the water, as it crosses his land, Saisse has requested that the following entry might be made, as to the use of the water, *viz*: that he acknowledges the right of Dubois to take, from the canal crossing his Estate all the water necessary for the use of his garden and

other domestic purposes, but not for the purpose of irrigating his plantations.

The Judgment of this Court is that the Demand is dismissed with costs.

Supreme Court.

VENTE DE PARTIE INDIVISE D'UNE PROPRIÉTÉ SUCRIÈRE, SUIVIE D'UNE SOCIÉTÉ CIVILE, — DÉCONFITURE DES ACQUÉREURS, CESSION DE BIENS ET ACCORD AVEC LES CRÉANCIERS,— DEMANDE EN RÉSOLUTION DE VENTE ET DE SOCIÉTÉ,—INTERVENTION DES CRÉANCIERS.

SALE OF UNDIVIDED PART OF A SUGAR ESTATE, ACCOMPANIED BY A CIVIL PARTNERSHIP,— INSOLVENCY OF PURCHASERS, CESSIO BONORUM AND ARRANGEMENT WITH CREDITORS, —CANCELLATION OF SALE AND PARTNERSHIP PRAYED FOR,— INTERVENTION OF CREDITORS.

Number of Record: 6557.

PRÉAUDET. Plaintiff.

Versus

A. MARIETTE & BOULLE. Defendants.

LANOUGARÈDE & E. MARIETTE. [Intervening parties.

Before:
The Honorable Sir J. E. REMONO 1st P. J.
The Honorable N. G. BESTEL 2nd P. J.

Hble. H. KŒNIG,—of Counsel for Plaintiff.
J. PIGNEGUY,—Plaintiff's Attorney.
E. LECLÉZIO,—of Counsel for Defendant.
J. B. COLIN— } of Counsel for intervening
A. LEGALL— } parties.
E. BOULLÉ.— } Attorneys for same.
G. TESSIER— }

4th March 1862.

By a notarial deed, before Pelte notary public, dated the twenty fourth day of May 1858, Péraudet, the Plaintiff, sold to Arthur Mariette and Jean Alfred Boulle, the Defendants, (two undivided fifths each,) the four undivided fifths of a Sugar Estate, known under the name of *Vaucluse*, situate in the District of Plaines Wilhems, with buildings machinery and all appurtenances, in consideration of a price of $72,259, 48.

The purchasers promised and bound themselves, jointly and severally, to pay to certain persons, holding mortgages on the said Estate *Vaucluse*, in the aforesaid instrument named, and in the manner set out in the said instrument, with interest; plus a further sum of $10,000 after the complete liquidation of all the various mortgages claims affecting the Estate *Vaucluse*. Mariette and Boulle, the Defendants, in the same deed, declare to accept a contract previously agreed, between the Plaintiff and the Mauritius Savings Bank, with respect to a loan intended to be made, for a certain sum of $19,109, 18 destined to pay certain mortgage creditors of the Estate, in the same instrument named, which said sum is to be paid with subrogation, in favor of the said Mauritius Savings Bank, into the said creditors, rights and privileges.

Although the aforesaid loan was duly made, the Defendants have not paid to the Mauritius Savings Bank, as they had promised, the interests due, at nine per cent per annum, amounting to the sum of $ 879,82 c., and proceedings were instituted to enforce payment of the aforsaid amount, especially by the seizure and sale of the Estate *Vaucluse*.

The said Mauritius Saving's Bank stands in the right of widow Semeville, who held a vendor's right upon the said Estate *Vaucluse* by the cancellation and annullation of the sale of the said Estate.

The Plaintiff further averred:

That by a notarial instrument of the 20th. day of May 1858, a civil partnership was entered into, by Plaintiff and Defendants, for the working and cultivation of the Estate *Vaucluse*, and this for the perriod of ten years, to reckon from the 24th day of April 1858.

That one of the conditions of the said partnership was that, in consideration of the abandonment, by the Plaintiff to the Defendants, until complete liquidation of the debts of the Estate *Vaucluse*, of his, the said Plaintiff's share, in the income of the said Estate, in order that the same be applied to such liquidation, they the said Defendants agreed to pay monthly, to the Plaintiff, the sum of $100, which said sum was to be considered as part of the general expenses of the Estate.

That the Defendants, although requested and summoned so to do, have not paid to him the sum of $100 due and claimed since the 24th of November last.

That since the date of the aforesaid sale and partnership, the Defendants have become and still are wholly unable to meet their liabilities, and have allowed numerous judgments to be given against them, submitting the Plaintiff who has been thereto compelled, to to pay to certain creditors, holding mortgages on *Vaucluse*, namely to Mrs E. Gallet, Gallet Junior, Widow Furcy Gallet, and to Mrs Emilien de Boucherville, the interests, due to each of them, on the said mortgages, since the 5th of June last, which interest the Defendants refused or neglected to pay and satisfy. That, in consequence of their, the Defendants, refusal or inhability to satisfy a personal claim of $1047.70, recovered against

them by one Victor Lanougarède, by a Judgment dated the twentieth of November last past, the four fifths of the Estate *Vaucluse*, belonging to the said Defendants, have been seized, by and at the request of Victor Lanougarède.

That Defendants, although requested and summoned so to do, have not caused to cease the proceedings instituted by the said Victor Lanougarède.

That such sale, if it were to take place, would render him, the Plaintiff, co owner of *Vaucluse*, together with strangers, which fact would be an inconvenience, never contemplated by him, at the time of the sale of the four individed fifths of *Vaucluse*, to the Defendants, and of the partnership between parties.

The Plaintiff therefore prayed that the sale made by him to the Defendants and, as a consequence, the civil partnership entered into be annuled cancelled and declared to be with, out force and effect; and that he, the said Plaintiff, do resume the entire ownership of the four fifths of the said Estate *Vaucluse*, free from all charges and liabilities to which the same may have been incumbered by the Defendants, with costs. Reservations were made by Plaintiff for claiming damages for the several breachs of their agreement.

This Declaration was filed in the Registry the twenty second day of January 1861.

On the 23rd day of January 1861, the Defendants, by Leclézio their Attorney, filed their Plea in the Registry.

In answer to Plaintiff's Declaration, they say that Plaintiff has no right, title or capacity to sue for the cancellation and annullation of sale of *Vaucluse*, and of the partnership existing between Plaintiff and Defendants, as in the said Declaration explained.

And for a second plea, the Defendants said that they are not indebted, in manner and form as alleged in the said Declaration.

And for a third plea the Defendants said that Plaintiff has, in hand, a quantity of sugar made at *Vaucluse*, and for which Plaintiff has to account with Defendants.

Wherefore the Defendants prayed that the Plaintiff's action be dismissed with costs.

Lanougarède and Emile Mariette, upon application to this Court, obtained, as creditors of Mariette and Boulle, to intervene in this suit.

On the 23rd day of May 1861, Mariette and Boulle stated that all their creditors had accepted an arrangement proposed by the latter, and prayed for leave to withdraw the petition in Cessio Bonorum filed by them. The said petitioners obtained to withdraw the said petition.

Lanougarède and Emile Mariette, intervening parties, maintained the motives of the opposition of Arthur Mariette and Boulle, to the demand of Préaudet, for cancellation of the Estate *Vaucluse*.

On the 4th day of December last, Jean Alfred Boulle was heard, in his personal answers; and on the eleventh day of the same month, Henry Montocchio, Eugène Mancel and Albert Villecollet were heard as witnesses.

Plaintiff and Defendants and intervening parties argued on the different questions raised by them.

Plaintiff argued that Arthur Mariette and Jean Alfred Boulle, who purchased the four fifths of the *Vaucluse* Estate, for and in consideration of a price of $72,259,48, which Arthur Mariette and Boulle promised and bound themselves jointly and severally to pay, to certain persons holding mortgages on *Vaucluse* Estate, in the manner specified an determined by the said notarial deed, with interests, have not strictly fulfilled, at least to a considerable extent, the obligation taken by them. Some interests have been paid to the Saving's Bank, and though no creditor, at present, sues for payment of his debt, it is a personal obligation, taken by Mariette and Boulle, towards Préaudet, who may sue for the payment of them. Arthur Mariette and Boulle were during some time, so convinced of their impossibility to meet their debts that they had recourse to a Cessio Bonorum as their only remedy. They have withdrawn the said Cessio Bonorum but have not shewn that they posses any mean of satisfying their creditors. Préaudet then is entitled to demand the cancellations of the sale which he made, in order to free himself of all his debts, and the intervening parties cannot set aside or stop the effect of the mortgage obligation of their debtors, in the hope of getting paid themselves, and it is not unreasonable, on Préaudet's part, to refuse his consent to such a pretention.

Whereupon the Court is of opinion that the sale made by Louis Julien Ernest Guyomard Préaudet to Arthur Mariette and Jean Alfred Boulle, on the 24th day of May 1858, of the four undivided fifths of the Estate *Vaucluse*, is cancelled; and further that the Plaintiff do resume the entire ownership of the four undivided fifths of the said Estate, free and unincumbered of all charges and liabilities, on the part of the Defendants Mariette and Boulle, and as a necessary consequence of the said cancellation, the civil partneship entered into between parties, for the working of the said Estate *Vaucluse*, is also declared null and of no effect.

Costs against Defendants Mariette and Boulle.

Court of Bankruptcy.

CERTIFICAT DE SECONDE CLASSE NE DEVANT AVOIR FORCE DE LOI QUE NEUF MOIS APRÈS LA DATE DU JUGEMENT.

CERTIFICATE OF THE SECOND CLASS GRANTED BUT NOT TO ISSUE TILL THE EXPIRY OF NINE MONTHS.

Bankruptcy T. SCHMIDT.

Before:
His Honor the CHIEF JUDGE, Commissioner.

Official Assignee, E. J. HERCHENRODER.
Creditors' Assignee, A. MAROUSSEM.

S. J. DOUGLAS,—of Counsel for Bankrupt.
C. LABORDE,—Bankrupt's Attorney.
A. LEGALL,—of Counsel for Assignees.
E. DUVIVIER,—Attorney for creditors' Assignee.

4th February 1862.

This was an application, by the Bankrupt, for a Certificate.

The motion was resisted by the Official Assignee and by MM. Thomas, Lachambre & Company, of Paris, who figured in the *Bilan* given in by the Bankrupt, for a debt of $2611,54. They were represented, in the Colony, by Arsène Maroussem, Merchant, Port Louis, Creditors' Assignee, who also opposed in that capacity.

The debts, admitted by the Bankrupt, aggregate to $34,549,29 c.; he stated his assets at $17,211.65 c. The actual dividend would not exceed some pence per pound.

Various points, in the conduct of the Bankrupt, as a trader, were pressed against him in the discussion. The following short narrative of the facts is sufficient to explain the grounds on which the Court proceed to dispose of the case.

The business had begun in 1851. A partner *en commandite* put in the whole stock, amounting to $6000. Schmidt contributing his "Industry," and taking the whole charge of the concern. The duration of the society was for 3 years, but it was not discontinued or wound up at the close of that period. The "affairs," as the Bankrupt himself stated in his examination, without being at any time "very flourishing, "went on pretty well until last year (1862.) I "cannot state what period of last year. They "were not flourishing for one year, before I "suspended payment. It was on the 12th "December last, (1860) that I was obliged to "stop my payments, because a warrant of "arrest had been served upon me, and having "obtained a delay of 24 hours, I placed "myself immediately under the protection of "the Court. I had, for some months before, "been in difficulties, but I had always hoped "to be able to arrange my affairs."

In fact the Bankrupt had been served with writs, in the previous month of June, or about that time, and this continued down to December; certain goods, (wines, corks, candles, &a.), to a considerable amount, which he had ordered from Messrs. Thomas, Lachambre & Co., of Paris, arrived in Mauritius in November 1860, by the ship *Ida*, of Bordeaux, and were delivered to the Bankrupt, on his granting bills of exchange for the amount. He immediately placed a large portion of these goods ($ 1875 worth, according to his own valuation) under dock warrants, and pledged them to a M. Boisson, for a loan, till 31st January following of $1000. He actually received only $889.34, the difference being deducted for interest and commission. The money so received, by the Bankrupt, was applied in retiring a bill of $500, on which no proceedings had been taken and in paying several small accounts.

On 12th December subsequently, he obtained from Maroussem a renewal of the bill, first falling due, for the consignment per *Ida*, making no mention of his having pledged a large portion of that very consignment, on the terms above mentioned, and when Maroussem, on the 1st December, called at the Bankrupt's place of business, to receive payment of the said bill, he found the store was closed and Schmidt was not to be seen, to avoid incarceration by a creditor. He petitioned this Court for protection, proposing an arrangement.

The goods under dock warrant were ultimately sold by Boisson, and left a balance of $187, payable to the Estate of the Bankrupt. The accountant employed in the case, Mr. Descroizilles, gave a very distinct account of how the business books had been kept:

RAPPORT SUR LES LIVRES.

JOURNAUX.

"Les journaux sont tenus régulièrement et d'après les principes généraux des double entrées, ou en partie double. Mais ils ne sont point écrits cependant jour par jour.

"Ils renferment une balance:

Au 31 Janvier 1852.
Au 31 Janvier 1853.
Au 31 Janvier 1854.

"Mais du 31 Janvier 1854 au 31 Juillet 1858, il n'y a eu qu'une balance de faite, et du 31 Juillet 1858 au 31 Juillet 1860, les livres n'ont pas été balancés.

" Les soldes, au 31 décembre 1860, ont été déterminés cependant, d'après les 2 états de débiteurs et créanciers arrêtés au 31 décembre 1860 ; mais les comptes au Grand livre n'ont pas été clos et ouverts à nouveau, la balance ou les deux états ci dessus n'ayant pas été rapportés sur le journal.

" Les articles de caisse et de livraison sont passés en bloc, pour tout un mois, de sorte que pour trouver les dettes et les sommes partielles, composant le total du mois, pour chaque débiteur ou créancier, il faut recourir de nouveau aux livres auxiliaires.

" La stricte régularité exige que les articles soient passés jour par jour, il est vrai, cependant, l'on a adopté généralement l'usage de passer, semaine par semaine ces articles, et même mois par mois, lorsqu'on n'a pas un grand courant d'affaires ; mais les dettes de paiement et de livraison et leur détail doivent, au moins, figurer au journal, autrement on est obligé d'avoir recours aux livres auxiliaires, etle journal tenu d'une manière irréprochable est destiné a les représenter et remplacer au besoin.

GRANDS LIVRES.

" Les Grands Livres me semblent correctement tenus, quoique sans détails. Ils sont balancés aux mêmes dates que les journaux ; ils n'ont point été balancés régulièrement depuis le 31 Juillet 1858, c'est à dire qu'il n'y a point de balance de clôture au 31 Décembre 1860 ; celle de vérification à cette date n'ayant point été rapportée encore sur les livres ; ce qui aurait rendu la vérification mathématique plus facile.

LIVRES DE CAISSE.

" Ils me paraissent convenablement et correctement tenus, mais la caisse n'a été balancée, chaque mois, que jusqu'en Octobre 1859. Depuis cette époque où elle balançait par $166, jusqu'au 31 décembre 1860, Fo. 98, elle n'avait plus été balancée. Les recettes, pour ce laps de temps, s'élèvent à $108,422,00 et les paiements, dans le même temps à..... $18,413,770

Laissant la balance de $8,23

" Depuis le 31 Décembre 1860 jusqu'au 2 Avril 1861, Fo. 98, les recettes, y compris la balance, sont de..... $256,53 c. et les paiements s'élèvent à $249,76

" Ces deux livres contiennent généralement les détails et sont bien tenus.

LIVRES DÉBITEURS DIVERS.

"Les 4 livres de débiteurs divers renferment les comptes des débiteurs de la maison, depuis le commencement de ses opérations ; ils sont tenus commele sont généralementde tels livres chez les marchands.

LIVRES DE COMPTES COURANTS.

" Sous le No. 16, existe le livre des comptes courants, lesquels sont écrits du Fo. 1 au Fo. 15. Je remarque que quelques comptes ne sont pas balancés et que les additions ne sont même pas faites.

LIVRES DE LIVRAISON OU MAIN COURANTE.

" Dans les livres sont inscrites, jour par jour, les ventes faites au crédit, à Divers, lesquelles sont ensuite transportées au Débit de chacun aux " Débiteurs divers " ; ces livres me paraissent convenablement tenus.

LIVRES DE VENTE AU COMPTANT.

" Ce sont 4 livres qui contiennent les ventes au comptant, les recettes et, en deduction, certain paiements.

" Ils servent ainsi de notes de caisse. Les ventes au comptant y sont portées en bloc, sans aucuns détails et même pour plusieurs jours. Il serait donc impossible de déterminer la quantité et la nature des marchandises sorties, d'une date à une autre. Chez les marchands détaillants l'usage est de porter les ventes au comptant sans détails ; néanmoins il y a des exceptions.

CARNET D'ÉCHÉANCE.

" No. 29. Ce livre commence seulement en janvier 1858 et finit en Déc. 1860. Il renferme la note des billets à recevoir et à payer, mais seulement depuis Janvier 1858. Ce livre me semble tenu convenablement.

LIVRE DE FRAIS DIVERS.

" Ces livres contiennent la note et le détai des frais divers payés journellement pour les compte du magasin tels que charrois, gages, avis de Gazette, &a. Ces frais sont ensuite rapportés aux livres de Caisse et au Journal.

" Les chiffres des deux états de Débiteurs et Créanciers, au 3 Décembre 1860, ou de la feuille, s'élevant à $41.772,06 me paraissent représenter exactement les soldes de Grand Livre et des divers comptes non balancés.

" L'état du 11 février 1861 ne correspond pas à ceux ci-dessus l'actif s'élevant à $17,211 et le passif s'élevant à $36,964

" Je remarque que M. D'Etienne, qui figure sur l'état du 31 décembre 1860, comme créancier de $4027,70 ne figure pas à la copie du Bilan déposé le 11 Février 1861.

"*Si les livres avaient été balancés chaque année comme c'est l'usage constant.* je les aurais alors trouvés généralement tenus d'ne manière" convenable pour des livres u de Commerçants.

JUDGMENT.

It cannot be doubted that the conduct of the Bankrupt, in his dealing with Messrs Thomas. Lachambre & Co., was not only most disingenuous, but highly culpable He was indifficulties of the most serious description, many months before the arrival of the *Ida*; and even at an earlier period, his position, as a trader, appears to have been quite hopeless. He took delivery of the goods nevertheless, from the *Ida*, turned a large part of these goods into money, by pledging them at an enormous loss, applied the funds so received in payment of debts, by no means pressing, and without the slightest hint to the agent of Thomas, Lachambre & Co. of the true state of affairs, prevailed on him to renew one of the bills which the Bank had granted for the goods received per *Ida*. Thus these creditors, and in truth all the creditors excepting those whom the Bankrupt has favoured by paying after he was insolvent, have been sacrificed.

The Bankrupt ought to have stopped payment, before he did so. A trader is not bound to cease trading merely because he is in difficulties, if there is a fair and honest prospect of his being able to extricate himself, he is entitled to go on with that view. But where he has continued trading, after all reasonable chance of his retrieving his affairs has ceased, and had thus gone on squandering the funds which should have remained for his creditors, he cannot be allowed to receive an unconditional certificate.

That is a mark of good conduct entitling a bankrupt trader to take his place again and at once, in the mercantile community without paying his debts. The books kept by the Bankrupt, though not free from all defects are, on the whole, not unsatisfactory as we have already seen. The journal was not indeed written day by day and the balance are defective, slump sums are sometimes given without full details,the Ledger and Cash Book are also exposed to some omissions of the same description; the book of sales for ready money is not quite complete,and the Bill Book begins only in January 1858.

It may not be altogether easy to define with precision what books a trader, by the existing law and practice of Mauritius, is positively bound to keep, in all cases; but this may be safely said that when the journal specially, and the other leading business books, usually kept by traders (and existing in this particular case) are plainly so ill kept or defective that his transactions cannot be discovered and checked, an immediate Certificate cannot be looked for by the Bankrupt.

Looking at the circumstance of the present case, Certificate of the 2nd class only can be granted, and that not till the expiry of nine calendar months, from the date of this judgment.

In the meantime protection is withdrawn.

Supreme Court.

CESSION DE BIENS.—CONCORDAT. OPPOSITION D'UN CRÉANCIER ALLÉGUANT LA FRAUDE.—ORD. No. 23 de 1856.

Lorsque les créanciers d'un insolvable ont signé, à la presqu'unanimité un concordat ayant pour but de suspendre une demande en Cession de biens. un créancier alléguant la fraude peut s'opposer à l'homologation de ce concordat par la Cour.

Il n'y a point fraude lorsque l'on contracte une dette, sans alléguer des faits inexacts, et que l'on a du reste de justes motifs de compter sur son remboursement.

En matière de Cession de Biens,(Ordonnance sur les insolvables.) les plaidoiries orales doivent être faites par les Avocats et non par les Avoués.

CESSIO BONORUM,— ARRANGEMENT UNDER THE CONTRGL OF THE COURT,—OPPOSITION OF A CREDITOR ALLEGING FRAUD,—ORD. No. 23 OF 1856.

Where an arrangement for putting an end to the Cessio Bonorum was signed by nearly the whole mass of creditors, a creditor alleging fraud oppose could the agreement,

Where the debt was contracted without alleging false statements, and with the reasonable expectation of paying the same, the Court held that it was not contracted by fraud.

In proceedings, under the Cessio Bonorum or Insolveney Ordinance,the pleadings in Court must be made by Counsel, not by attornies.

CESSIO BONORUM.

MAINGARD père & fils & CHEVREAU.

Before:
His Honor the CHIEF JUDGE.

G. B. COLIN,—
A. LIONNET,—
S. J. DOUGLAS,— } of Counsel for Petitioners.

C. LABORDE,—
E. DE CHAZAL,— } Petioner's Attornies.

W. HEWETSON,—Attorney for opposing creditors.

20th March 1862.

In this case, M. G. B. COLIN stated that, under sect. 35 of the Cessio Bonorum or Insolvency Ordinance, he had to move the Court that this Cessio Bonorum be discontinued or annulled. The aggregate debts of the Petitioners approached $300,000, and he held in his hand, a formal deed of consent, subscribed not only by three fourths in number and value of the creditors, but by the whole body of creditors, excepting two, one of whom remain-

ed passive and inactive, the other, whose claim was only $1500, he believed, intended to oppose the motion.

The section of the Ordinance on which he based his application, viz.: sect. 35, is in these terms.

"Any agreement made pending or after the Cessio Bonorum, between the Debtor and three fourths, in number and value, of his creditors, shall, subject to the approval of the Court, be binding upon all the creditors. If the Court shall deem such agreement reasonable, it shall order the same to be filed and entered of Record, in the Registry, and shall further order that the said Cessio Bonorum be discontinued or annulled, as the case may be. &a."

Lately, in the Cessio of Mr. Ange Hardy, where the obligations were still larger, His Honor the Chief Justice gave effect to the arrangement of creditors under this clause, and the process was immediately brought to a close.

Mr. Hewetson, Attorney, rising to state the case of the opposing creditor.

Mr. Douglas, *Substitute Procureur and Advocate General*, objected to his appearance, informing the Court that it had been ruled, on a former occasion, after consultation of the whole Judges, that under the Cessio Bonorum or Insolvency Ordinance, parties must be represented by Counsel. With this protest, he had no objections to Mr. Hewetson appearing on the present occasion.

His Honor the Chief Judge. I will look into the matter. The case may go on in the meantime.

Mr Hewetson: I represent Messrs Thomas Lachambre & Co., of Paris, who are creditors to the amount of $1500, and they not only are no parties to this alleged arrangement, but they say that their debt was contracted by fraud; and the insolvents, having bought the articles, (certain guanos) from them, when they had no reasonnable prospect of being able to pay for the price, and on false pretences of solvency, they are liable to be sent to prison for a period not exceeding 18 months. The matter is regulated by sect. 30 of the Ordinance which runs thus:

"If it shall appear to the Court, that the Petitioner has fraudulently contracted any debt among other modes, either by means of false pretences, or without reasonable expectation, at the time of contracting such debt, that he should be able to pay the same, the Court, in such case, shall order his committal or detention, in prison, for a period not exceeding 18 months. The opposing creditor therefore moved for leave to adduce evidence.

Mr. Douglas, for the Insolvent Maingard the father:

The terms of section 35 are quite general and unlimited. Nothing can be more reasonable than that the minority of creditors should for the common interest, be bound by the majority. The vague charge of fraud here is quite irrelevant at this stage. The Insolvency Ordinance contemplates several different things, and is clearly divisible into parts. Section 35 stands by itself, and has nothing to do with sect. 30 ordering a punishment by imprisonment, in certain cases. I admit that the charge here preferred, might bear the right of a discharge, if we were proceeding in that direction but we are moving under a seperate and categorical section, having a different object altogether. I also admit that any charge of fraud, in getting up the proposed discharge, would form a relevant subject of inquiry at this stage.

Mr. Leonnet, for his client Maingard Fils, adopted the argument of the other Counsel.

His Honor the Chief Judge: It is a somewhat startling proposition to maintain that, under section 35 of this Ordinance, a charge of fraud, on the part of the Insolvent, in contracting one or more of his debts, is not a relevant matter for inquiry. It is true the Ordinance is of a somewhat composite description, combining various parts of the law of *Cession de Biens* of the Codes, with certain enactments of the Insolvency Statutes of England, and also regulating the remedies open to creditors by Bills of Exchange, and other mercantile documents, against their debtors.

But sect. 35 is not, in the opinion of the Court, so separated and detached from the other regulations of the Ordinance, particularly those borrowed from the French Law, as to give the majority of the creditors, therein mentioned, complete control over the minority in all circumstances. The provision must, I think, be dealt with as so far within the Cessio that any thing contrary to the *bonne foi*, specially required in the debtor, must affect any such projected discharge. Besides, if the proceedings were really tainted with fraud, how could the Court deal with the proceedings, or so important a matter as the agreement, as reasonable? "In a case like this, where there are three partners, very delicate questions might arise, as to the participation of one in the acts of the other, as the wrongful act of one party will not, in ordinary circumstances, be taken also as the act of the other: *Culpa tenet suos auctores.*

Again, it is possible that the discharge might take effet. though a punishment should be inflicted on the party or parties who may be proved to be implicated in the alleged fraud; these are but speculations however, as we need not anticipate matters which an investigation

of facts, in each particular case, can alone disclose.

The Petitioners withdrew their opposition to the proposal of the opposing creditors to bear a proof of their allegations; and the Petitioners Maingard père and Chevreau were examined at length.

JUDGMENT.

For the reasons which the Court has already stated, it saw little reason to doubt that the Court here, taken by Mrs Thomas Lachambre and Co., was a competent and relevant one. But any formal decision of this question of law is practically unnecessary, for the view which the Court takes is that, on the evidence adduced by the opposing creditor, it is not satisfied that the guano in question was purchased in such circumstances as to bring the debtors within the aforesaid Section 30 of the Ordinance. It was justly remarked, on the part of the opposing creditor, that the Petitionner, in a *Cessio Bonorum*, must satisfy the Court of his *Bona Fides*. This is quite true, and the law in the above section has declared that, for certain enumerated acts of fraud, the Petitioner shall undergo a term of imprisonment. By the examination of two of the Petitioners, Joseph Maingard and Rivalz Chevreau, the opposing creditor has endeavoured to establish that, by the purchase of the guano in question, made on 23rd or 26th October 1861, by Joseph Maingard, the whole three are so involved in the alleged fraud, that the Court cannot consider or approve of the proposed arrangement with the general body of the creditors. Now, one thing is quite clear that taking the whole assets of the debtors, on one side, and their whole debts and obligations on the other, and even allowing a high valuation of the Estate, a very small balance, if any, remains in their favor. No doubt considerable delay had been granted for the liquidation of those debts, by many of their creditors; such delays often afford substantial relief to an embarrassed debtor, but the fact is clearly that the financial position of the petitioners was as has just been stated.

But the strong point in their favor is this. Had the sugar crop of 1861 come up to any thing like what they were fairly entitled to expect, they would not have required to suspend payment. The petitioner Chevreau has deposed, and the Court sees no reason to doubt the truth of the statement:

"The crop of the Estate was, in 1859, of about one million and five hundred thousand pounds of sugar, the Estate had then less men and less lands, and the "matériel" was less considerable.

"The crop of 1860 was 2,400,000 pounds weight of sugar, and in 1861 the crop has been 1,400,000 pounds weight In 1861 we had one hundred and fifty acres of canes more to cut, than in 1860; we had also about 200 men more, and the canes had been manured with sixty tons of Peruvian guano, and fifty of Bolivian guano, more than the preceding year, besides the usual quantity of Ichaboe guano

"We anticipated, before the hurricane, that we would realize a crop of three millions, we estimated it after the hurricane, at two millions five hundred thousand pounds, as we had nearly 1,100 acres of canes to cut. A million of sugar is worth £10,000, speaking in round numbers. Had our anticipation been realized, our debts were reduced by about $50,000 more than the amount that we had to pay in November and December; we would not have been obliged then to suspend our payments."

The same petitioner also deposed, that as soon as they had reason to fear the shortness of the crop of 1861, they took steps to meet their creditors.

"At the date of 23rd October 1861, the date of the purchase of the guano, I had received about eight hundred and sixty thousand pounds weight of sugar, and considering the crop of the preceding year, which gave two millions four hundred thousand pounds weight of sugar, we could fairly expect a larger quantity. At the same date, the year preceding, I had received about 1,164,430 pounds weight of sugar; the crop of 1861 began one month later than that of 1860.

"The difference between the crops was certainly apparent in October, but I was then absent from my office, on account of illness. I was so during the whole month of October. In the beginning of November, on or about the sixth of that month, I wrote to Mr Henri Maingard the father, a stranger to our concern, in order that he should go on the Estate, and examine the canes and make an estimation of their yield. He did so, on the eighth. On the 9th I went to see Mr Henri Maingard, and he told me that, in his opinion, the remainder of the crop would not exceed 400,000 pounds weight of sugar. We, the partners of *Grand Gardle*, met at the said Mr. Henri Maingard's place, and having put ourselves in presence of our situation, and finding that it was impossible to continue working the Estate with such a small crop, we decided upon asking for delay from our creditors."

It has been strongly argued that the debt for the guano was contracted by false pretences, in respect the purchasing partner, Mr. Joseph Maingard, did not inform Mr. Maroussem, agent of the opposing creditors, of the state of the partnership's affairs when bargaining for the guano. The Court cannot adopt this view. False pretences, in law, usually imply, the positive averment of false statements and inducements, not the mere negative position of remaining silent. The

allegatio falsi is commonly required; not the mere *suppressio veri*.

In the actual position of parties, there was not, in the opinion of the Court, any fraud or false pretence in not taking the most exceptional course of stating to the vendor, the detail of the financial position of the firm, when the guano was bought. The single and simple issue to be determined here is: had the Petitioners reasonable expectation of paying for the guano, when they bought it? The Court is of opinion that they had, and that there is nothing, in their conduct, to prevent the arrangement with the creditors taking effect.

The Court therefore approves of that arrangement and, under sect. 35 of the Ordinance, orders these proceedings to be brought to a close.

His Honor the Chief Judge. I find, in inquiry, that it has been decided, by the whole Judges, that attornies are not entitled to plead for parties, under the Insolvency Ordinance. That of course, fixes the rules of procedure.

Supreme Court.

Appel d'un Jugement de Cour de District,—Coups et outrages.—Emprisonnement et amende,—Réduction de la peine.

Appeal from a Conviction of the District Magisrate,—Assault & outrages,—Imprisonment & fine,—Sentence mitigated.

Number of Record. 140.

KAROO, Appellant.
Versus.
THE QUEEN Respondent.

Before:
His Honor the Chief Judge.

A. Lalouette,—of Counsel for Appellant.
U. Hitié,—Appellant's Attorney.
S. J. Douglas—Sub. Proc & Adv. General.
J. Bouchet,—Queen's Attorney.

4th March 1862.

This was an appeal from a Judgment of the District Magistrate of Savanne. The Appellant was charged with unlawfully trespassing on the Savannah estate and wickdely catching hold of Joseph Darné, the manager, by the neck, with intent to do him harm.

The party accused pleaded "guilty of the trespass, but not guilty of the batteries."

It appeared, in evidence, that the accused had, at one time, been dismissed and been told not to come again on the property. He then became a shop-keeper and rose to the position of paying a "first class" Licence. On occasion of a wedding party, among the Laborers, to which he had been invited, in December last, he appeared among the guests, and passed the night in one of the *cases*. Information having been given to the Manager that he was on the premises, the latter sent two of his servants to bring the appellant before him. This was about 5 o'clock in the morning. He was found in bed and asleep. The messengers roused him and he was conducted before the Manager. On being asked what brought him on the Estate, he made and insolent reply to the Manager, who then laid hands on him, without any violence; the Appellant on this, in the words of two of the witnesses, "leaped on the Manager, and seized him by the throat. He was dragged off by the servants present."

The Appellant was tried on the charge above stated, and after a full trial and defence by Counsel, was convicted "of the misdemeanor "charged against him and, under the 230th "article of the Penal Code of this Colony, "adjuged to be imprisonned, in her Majesty's "Jail at Savanne, for the space of 3 legal "months, and to pay and forfeit a fine of £10 "and to pay 7 s. for costs; and in default of "the payment of such sum of £10. 7 s. to be "imprisonned for a further period of sixty "days."

He appealed, and after argument, the Court gave Judgment:

By article 230 of our Penal Code, it is enacted.

"Lorsque les blessures ou les coups n'auront "occasionné aucune maladie ni incapacité de "travail personnel, de l'espèce mentionnée "dans l'article 228, le coupable sera puni d'un "emprisonnement qui ne pourra excéder un "an, et d'une amende qui n'excédera pas "£50.

"S'il y a préméditation ou guet à pens le "coupable sera puni de l'emprisonnement et "d'une amende qui ne pourra excéder £100."

There must be a *coup* or *blessure*. Every slight act of violence does not fall within the law; and in this respect, the law of assault in England may be considered somewhat different from ours.

The above interpretation of the law has been repeatedly given by the French Courts, under the corresponding section of their Penal Code, which now stands No 311. *Cour Cass.* 14 April 1821. Bull. No 61. *Cour Cass.* 16th March 1841. Bull. No. 73.

But the charge of throwing clods of earth, or pebbles, which reached the person, without wounding him, was held to be within the Law

Metz, 30 November 1818. As so would a caff or slap with the open hand. *Chauveau & Hélie*. P. 584. though spitting in the face would not, *Douai*, 15 Feb. 1844, S. V. 1844, 2, 338.

In the present case, the Court is of opinion, with the learned Judge below that the act charged and established in evidence fell within the law. But the case, looking at all the circumstance which have been already detailed, and which it is unnecessary to repeat, was not an aggravated one, and it must be borne in mind that the parties did not stand, towards each other, in the relation of Master and servant.

Exercising, therefore, the powers expressly conferred upon this Court, by law, of modifying the sentences of the Courts below, Judgment is now given that the term of imprisonment awarded by the Magistrate, should be reduced to one legal month, and that, *quoad ultra*, that sentence shall stand.

Costs to neither party.

Supreme Court.

SOCIÉTÉ, —PREUVE PAR TÉMOINS.

PARTNERSHIP,—ORAL PROOF.

Number of Record. 6012

COCHRANE, Plaintiff.

versus

LEISHMAN, Defendant.

Before:

The Honorable SIR J. E. RÉMOND, 1. P. J. and The Honorable N. G. BERTEL 2d. P. J.

G. B. COLIN,—of Counsel for Plaintiff.
A. J. COLIN,—Plaintiff's Attorney.
S. J. DOUGLAS,—of Counsel for Defendant.
J. SLADE,—Defendant's Attorney.

20th March 1862.

(*Vide. Vol.* 1 *Pages* 170, 195.)

Upon an application, at Chambers, for leave to subpoena a witness, to prove certain facts mentioned in the Notice served upon the Plaintiff, and upon the objection taken by the Matter to the Judge's jurisdiction at Chambers, the matter was referred to the Court, to be taken on Tuesday last, 11th of March instant, when it was agreed between parties that the Court should take the matter into consideration.

The Court therefore now proceeds to deliver its judgment on the above application. But before doing so, it is necessary that it should be stated that a similar application had been made to the Court, and that, by judgment of the 18th December last, it was ruled that the evidence, then sought to be adduced, at the then advanced stage of the proceedings, being altogether irrelevant, could not be allowed.

This application is a second attempt at reaching the end contemplated by the Defendant, on the first motion, with this difference, however, that the affidavits of Slade, in support of the first motion, mention the existence of two Insurance Companies, under the respective names of "Asiatic Insurance Company" and "Asiatic *Marine* Insurance Office," the first of which existed, as sworn to by Slade, from 1847 to 1852, and of which it is sworn also, that the Defendant was a shareholder, and to which Leishman's power to Fergusson was also sworn to refer.

On this application, the facts, sought to be proved by the witness to be subpœnaed, are that there existed in India two companies bearing the same name, namely: the "Asiatic Marine Insurance Office," the one beginning in 1847 and lasting to 1852, when it was wound up, of which Leishman is admitted to be a shareholder, and the other beginning in and continuing to fourth August 1855.

The similarity in the name of the two companies cannot render admissible the proof of a fact which, if duly made, could have no influence on the merits of this case.

The company now suing, by its Official Assignee, Cochrane, is that Company which came into existence in 1852. The deed of partnership signed H. A. Leishman, by his attorney W. F. Fergusson was the deed of the Company of 1852 to 1855. The adjudication of forfeiture, at the request and on the petition of Fergusson, and the vesting order of the fourth August 1855, mentions the Company. (Asiatic Marine Insurance Office of 1852 to 1855).

The proof that the Company of 1847 to 1852 has no claim against Leishman will not discharge the latter of his liability, if any, to the Company of 1852 to 1855.

His answer that he is not indebted to the Company of 1847 to 1852 will not discharge him of any claim which the company of 1852 to 1855 might have against him. The evidence sought to be introduced into this cause, at this late hour, would be irrelevant. The Court therefore refuses the subpœna and oral proof prayed for, with costs.

Bail Court.

EXÉCUTION D'UN RÉGLEMENT DE COMPTES FAIT PAR LE MASTER,—PROCÉDURE.

La Cour ayant chargé le Master de faire un réglement entre parties, au sujet d'une consignation de caisses de champagne, et le Maste

ayant établi ce réglement sur des comptes produits d'une manière irrégulière ; la Cour, sur la réclamation en paiement de ce réglement, l.a confirmé après en avoir réduit le chiffre.

SETTLEMENT OF ACCOUNT BY THE MASTER, —PROCEDURE.

Under a remit to the Maser, to strike a balance between the parties in a case of small account, arising out of a consignment of certain cases of champaign, both parties having relied on evidence not strictly legal, and the Master having struck the balance on that evidence, the Court, in the special circumstance, affirmed the proceedings, modifyiug the balance struck to a certain extent.

Number of Record. 2988

PRAUD. Plaintiff.
versus
GACHET & Co. Defendants.

Before:

His Honor the CHIEF JUDGE.

C. M. CAMPBELL,—of Counsel for Plaintiff.
U. HITIÉ,—Plaintiff's Attorney.
J. L. COLIN—of Counsel for Defendants.
E. DUCRAY—Defendants' Attorney.

12th March 1862.

In this case, the Plaintiff demanded $261,16 as the alleged balance of an account of 116 cases of Champaign, which had been consigned by him, to the Defendants, for sale.

On the sixteenth May last, the case, of consent of parties, was referred to the Master, "to comput the accounts between the parties, and to strike the balance, costs reserved."

The Master, after various proceedings had before him, ultimately issued a revised Report, finding that the Defendants should pay for the whole Champaign, consigned to them by the Plaintiff, at the rate of $8 per case, "the rate at which Gachet and Co. have, in their account, credited Praud for cases missing and unaccounted for."

Against the conclusions of the Master, J.L. COLIN contended: (1o) That the procedure had been altogether irregular, affidavits, certificates extracts from books &c., had been admitted as evidence. (2o) The rules of Court, as to giving notice of the names of the witnesses, and what they were called to prove, had not been observed. (3o) The sum for which the Master had found that the Defendants should give credit for the Champaign, was altogether arbitrary, and was not fixed on any correct principle.

CAMPBELL, for the Plaintiff, answered that, no doubt the procedure had not been strictly in accordance with the forms of the Supreme Court, or the rules of evidence. But that in cases of small amount like this, such departure from rigid order, saving as it did great delay and expenditure, was not to be condemned. And both parties had been equally to blame. The result arrived at, was fair and just in the whole circumstances and ought to be affirmed.

JUDGMENT.

Although the subject in dispute may be comparatively but of small amount, any departure from the ordinary rules of evidence is so hazardous, for the ends of Justice, that it should be very anxiously watched. At the same time, in a case like the present, of small amount, where neither party has observed the strict rules of evidence, a tacit consent not to object, and to allow the case to be disposed of on a sort of *talis qualis probatio*, may be reasonably inferred from their conduct towards each other. At all events, to send the case back again to the Master to commence his investigation *de novo* would tend to really no beneficial end.

It has been maintained, by the learned Counsel for the Appellants, that if goods consigned for sale have gone amissing and cannot be accounted for by the consignees, they are liable only for their market value, which may be taken as evidenced, by the result of a sale by auction, of the same article, at or about the same date.

The Court is not satisfied with such a mode of ascertaining the amount of compensation which the consignees must pay. The result of such forced sales may, frequently, be quite fallacious. At the same time, the Court is not able to agree, in all respects, with the conclusions at which the Master has arrived. It is of opinion that his estimate of the value of each case of Champaign for which the Defendants must account, is too high. Something more approaching to the average amount of the prices actually realized appears more reasonnable. The Court, therefore, reduces the Estimate of the Master from $8 a case to $7, but on the other hand considers that the Plaintiff Praud is entitled to a portion of his costs, which the Court fixes at half of his account, as it shall be taxed by the Master.

Supreme Court.

APPEL D'UN JUGEMENT DE LA COUR DES FAILLITES,—USAGE COMMERCIAL,—RAISON SOCIALE,—CERTIFICAT.

Un failli D, ayant fait le commerce sous la raison Sociale "D & Compagnie," quoiqu'il n'eut pas d'Associés, et ayant prouvé qu'en agissant ainsi il avait suivi un usage Commercial adopté à Maurice, et qu'il ne résultait de ses actes aucune mauvaise foi, a obtenu de la Cour un Certificat de première classe.

APPEAL FROM A JUDGMENT OF THE COURT OF BANKRUPTCY,—USAGE OF TRADE,—STYLE OF FIRM—CERTIFICATE.

A Bankrupt D, moving for a Certificate, having traded under the Firm "D. and Company." although he had no partner, having proved that such a practice was recognised by the Custom of merchants in Mauritius, and no Mala Fides *appearing, the Court granted a first class Certificate.*

DROUHET. Appellant.

versus

The ASSIGNEES of the Bankruptcy Drouhet, Respondents.

Before:

His Honor the CHIEF JUDGE and The Honorable SIR J. E. RÉHONO 1. P. J.

G. B. COLIN,—of Counsel for Appellant.
A. J. COLIN,—Appellant's Attorney.
L. ARNAUD,—of Counsel for Respondents.
J. GUIBERT,—Respondents' Attorney.

21*st March* 1862.

(*See Vol.* 1. *P.* 207.218.)

In this case, the Court, on appeal from the Judgment of the Honorable Commissioner, allowed the Bankrupt to prove, if he should be able, that the course he followed, in trading under the form of "Drouhet and Co." while he never had a partner, was in conformity with mercantile custom, generally, and particularly with that of Mauritius, and also to lead evidence to shew the *Bona Fides* of his conduct, in the matter in question.

Several of the most eminent Planters and Merchants of the Colony have been examined; amongst others, Mr. P. A. Wiéhé, President of the Chamber of Commerce, and the Bankrupt has tendered a list of upwards of 20 gentlemen, of the highest respectability as witnesses. The Court has not thought it necessary to have these latter called into Court being satisfied that their depositions would substantially agree with those of the gentlemen already examined.

It is now established, to the satisfaction of the Court, that, by the custom of Merchants in Mauritius, as well as elsewhere, a single individual may carry on commercial business, under a firm containing, in addition to his own names, the words "and Company," although he himself is the sole party interested. This practice is said to have been introduced, from the convenience of continuing to carry on an established business, without an alteration of the Firm, in the case of death, or change of the actual partners.

Whatever our own impression may be of the risk of countenancing such a practice, looking at the inveteracy of the custom, in the mercantile community, we do not feel ourselves warranted to interfere with it. It is plain, however, that in some cases such a course of action may be adopted for very improper purposes, and Courts of Justice will narrowly watch the slightest appearances of *Mala Fides* but in the present case nothing of that nature appears.

No one seems to have been, in the least degree, imposed upon; the persons who dealt with the Bankrupt appear to have been aware of the position of the alleged firm, and to have relied, exclusively, on the personal credit and standing of the Bankrupt. While, therefore, as the case stood before the learned Commissioner, he could scarcely have arrived at any other conclusion than the one he reached, and which is now under appeal, with evidence before us, we are of opinion that a first class Certificate should be awarded to the Bankrupt.

Had we any reason to suppose that there was any dishonesty in the course adopted by the Bankrupt, any purpose to impose upon the public or those with whom he dealt, the result would necessarily have been very different.

Court of Assizes.

LE FAIT DE JURER UN FAUX AFFIDAVIT, EN MATIÈRE CIVILE, CONSTITUE LE CRIME DE FAUX TÉMOIGNAGE, PRÉVU PAR L'ART. 278 DU CODE PÉNAL,—ORD. No. 30 DE 1855 SUR LES BILLETS A ORDRE.

BY THE LAW OF MAURITIUS, THE SWEARING OF A FALSE AFFIDAVIT BY A PARTY SUED TO PAY, UNDER THE BILL OF EXCHANGE ORD. No. 30 OF 1855, IS GIVING FALSE EVIDENCE IN A CIVIL MATTER, UNDER ART. 278 OF THE PENAL CODE.

THE QUEEN,

Versus.

WIDOW ROZAN AND ATE. DURASSIER.

Before:

THE FULL BENCH.

THE HON. W.G. DICKSON,—Procureur and Advocate General.
E. NOLIN,—Crown Solicitor.
A. LIONNET,—of Counsel for prisoners.
C. LABORDE,—Attorney for same.

24*th February* 1862.

(See Vol. 1. Page 119.)

In this case, the Information, by the Crown, was as follows:

In Her Majesty's Supreme Court of Justice, in and for this Island of Mauritius.

"Mauritius } Be it remembered that on this
to wit: } 24 th October 1860, the Honorable William Gillespie Dickson, Her Matesty's Procureur and Advocate General, in and for the said Island of Mauritius, informs the Court here, that before, and at the time of the commission of the offence hereinafter mentioned, to wit, on the 13th June 1861, there was a certain suit between one Volcy Dumont, as Plaintiff and one George Fauvette, and one Marie Eléonore Amélia Barret, the widow of the late André Honoré Rozan, as Defendants, pending in Her Majesty's Supreme Court aforesaid, the object of which suit was to recover, on behalf of the Plaintiff aforesaid, against the Defendants aforesaid, a certain sum of money, being the amount of a certain promissory note, subscribed by the said George Fauvette and endorsed by the said Marie Eléonore Amélia Barret, and that the Defendants aforesaid, having been duly summoned, either to pay the amount of the promissory note aforesaid, or to obtain leave to defend such action, upon application made to the Judge sitting in chambers, and supported by affidavit, shewing that there was a defence to the said action, on the merits, the said Marie Eléonore Amélia Barret, one of the Defendants aforesaid, did, on the twenty first day of June 1861, make application as aforesaid, supported by an affidavit as aforesaid; and Her Majesty's said Procureur and Advocate General says that the said Marie Eléonore Amélia Barret did, then and there, commit perjury and give false evidence, in the said suit, in this to wit; the said Marie Eléonore Amélia Barret, being called upon to swear to the truth of the contents of the said affidavit, did, then and there, falsely, wilfully and corruptly swear and take her oath, before the Honorable Charles Farquhar Shand, Chief Judge of Her Majesty's Supreme Court aforesaid, amongst other things, and to the effect following: that is to say, that the alleged signature put on the back of the said alleged promissory note, and alleged to be her signature, (meaning the signature of her, the said Marie Eléonore Amélia Barret) was not her signature, (meaning the signature of her, the said Marie Eléonore Amélia Barret,) and that she, (meaning her, the said Marie Eléonore Amélia Barret,) did not endorse the said Promissory note, and that the signature "Vve Rozan," found on the back of the said promissory note, was not her signature (meaning the signature of her, the said Marie Eléonore Amélia Barret; whereas, in truth and in fact, the signature, on the back of the said promissory note, was really the signature of her, the said Marie Eléonore Amélia Barret, and whereas, in truth and in fact, she, the said Marie Barret, did endorse the said promissory note, and the signature "Vve. Rozan," found on the said promissory note was, in thruth and in fact, the signature of her, the said Marie Eléonore Amélia Barret, as she, the said Marie Eléonore Amélia Barret, at the time of so falsely, swearing, as aforesaid, well knew. And so Her Majesty's Procureur and Advocate General aforesaid says, that the said Marie Eléonore Amélia Barret, on the 21st day of June in the year last aforesaid, before the said Honorable Charles Farquhar Shand as aforesaid, did wilfully and corruptly commit perjurey and give false evidence, in manner and form aforesaid;

And Her Majesty's Procureur and Advocate General aforesaid further says, that one Auguste Durassier did wilfully, and corruptly, cause and procure the said Marie Eléonore Amélia Barret, the said offence, in manner and form aforesaid, to do and commit, and is, by reason of the premises, guilty of subornation of perjury, against th form of the Ordinance, in such case, made and provided.

(Signed) W. G. DICKSON,

Procureur and Advocate General."

To this charge the prisoners pleaded:

"The said widow Rozan and Auguste Durassier, in their own proper person, come into the Court, here, and having heard the said Indictment read, say that our said Lady the Queen ought not further to prosecute the said Indictment against them, because they say that, heretofore, to wit, at a sitting holden before M. Junior District Magistrate of Port Louis, Victor Esnouf, they, the said accused, were lawfully acquitted of the said offence, charged in the said Indictment. And this they are ready to verify.

Wherefore they pray Judgment, and that, by the Court here, they may be dismissed and discharged from the said premises, in the present Indictment specified.

And for a *second* Plea, the said accused say, that the facts, laid down in the Indictment, do not constitute any crime punishable by the Law of Mauritius.

And, that the said accused be discharged and dismissed from the said premises, in the said Indictment specified."

The Crown replied:

"And hereupon the Honorable the Procureur and Advocate General, who prosecutes for our said Lady the Queen, in this behalf says, that by reason of any thing in the said first plea of the said Widow Rozan and Auguste Ducassier, above pleaded in bar alleged, our said Lady the Queen ought not to be precluded from prosecuting the said Information, against the said Widow Rozan and Auguste Durassier, because protesting that the said District Magistrate had no power or jurisdiction finally to find, hear or determine the matter of the said information, the said Procureur and Advocate General says that the

said Widow Rozan and Auguste Durassier were not acquitted of the said offence, as in the said plea alleged, and this he is ready to verify.

And as to the said second Pleas, the said Procureur and Advocate General says, that the facts laid down, in the said Information, do constitute a crime punishable by the Law of Mauritius, and this he is ready to verify."

The prisoners having been arraigned, at last assizes, before His Honor the Chief Judge, it was ordered by the Court, that the question raised should be argued before the Full Bench. This was accordingly done.

LIONNET, for the prisonners, submitted:

The accused were called before the District Magistrate, Mr. Esnouf, on precisely the same charge as is now advanced against them, and they were formally acquitted. The Judgment of the Court was as follows:

"Whereas the Information, now before me, against Mrs Widow Rozan and Mr Durassier charges the former which having falsely, sworn an affidavit and the latter with having caused and procured the said Widow Rozan to swear the said affidavit.

"Whereas affidavits are not included in the Penal Code of this Colony, (Ordinance No. 6 of 1838.)

"Whereas Articles 276, 277, and 278 provide only for false testimony, either in criminal, correctional, or Police matters, or in a Civil suit.

"Whereas Article 281 is relative to a party to whom an oath is submitted or referred, (*déféré ou référé*) in a civil action, by the adverse party.

"Whereas in this present case, Mrs. Rozan was neither a witness nor a party to whom an oath has been submitted, by the adverse party.

"Whereas penal laws cannot be extended, from one case to another, without a special disposition, and must be restrained to those matters, only, for which they have been enacted.

"Whereas, as regards Durassier, no charge can stand against him, if Mrs. Rozan cannot be punished.

"For these reasons, I consider that there are no sufficient grounds for proceeding, and therefore dismiss the Charge."

LIONNET continued:

The Procureur General himself selected that Court, for the trial of the case, and he cannot now repudiate the tribunal of his own choice. On behalf of the accused, I argued that the facts set forth do not, by the law of Mauritius, amount to a crime, and the Magistrate sustained that argument. Perhaps it may be said that the Magistrate went beyond his power and Jurisdiction, in dismissing the charge, as by sect. 16 of article 102 of the District Court Ordinance (Criminal side) No. 35 of 1852, he is not competent to try charges of "False testimony," except if given before a District Magistrate or the Mayor's Court, and punishable according to article 277 of "Penal Code" But by our Law, there can be no *false evidence* given by a person, in a suit to which he is himself party, as he is not admissible as a witness and penal Laws are not to be extended, but are necessarily subject to the strictest interpretation. Speaking generally affidavits are not known in the law of Mauritius and it required the special enactment of the Bankruptcy Ordinance, sect. 191, to make false declarations or affidavits, by Bankrupt or their wives, punishable under the article 278 of the Penal Code which runs in these terms: "Le coupable de faux témoignage, en matière "civile, sera puni de l'emprisonnement, et "même de la réclusion." And a similar special enactment is to be found in article 2 of Ordinance 16 of 1856, authorizing the substitution of affirmation by Hindoos and Mahommedans, in lieu of oaths.

But, *secondly*, I maintain, that swearing a false affidavit (however immoral such an act may be) is not a crime cognizable by the law of Mauritius. Affidavits, as I have already said, are all but unknown in our law, and although false statements, in affidavits, are punishable as perjury in England, we have no such enactments in Mauritius. The only Article of our Penal Code, even approaching this matter, is article 278 (above quoted) As by our law no party can be examined in his own case, the accused Widow Rozan could give no "false evidence" in the suit, upon the bill of exchange referred to, and the charge against the other accused Durassier, can stand only if that against the other prisoner is sustained.

Besides, the very essence of any crime namely: the intention to injure some person was here wanting; Mrs. Rozan made no use of the affidavits herself. The case where a party to a Civil suit can swear falsely, are provided by Article 281 of our Penal Code.

"Celui à qui le serment aura été déféré ou "référé, en matière civile, et qui aura fait un "faux serment, sera puni de la réclusion, et "d'une amende qui n'excédera pas £500."

This article relates to the not unusual case where a party to a suit refers the matter in dispute to his adversary's oath, and has no application to the case of voluntary affidavits. False testimony, to be punishable, must be,

not in a cause to which the accused is a party, but in a cause *d'autrui*. (See MERLIN, *Répertoire*. "Faux témoignage," Sect. 1.

THE HON. PROCUREUR AND ADVOCATE GENERAL answered:

I. The Information sets forth a crime according to both the Penal Code and the Ordinance No. 30 of 1855.

10. There is no difference, in principle, between a false oath, emitted in the witness box, and one made before a Judge, in Chambers. Both have the same element of crime, falsehood on oath, intended to mislead the Court on the facts, and benefit unlawfully some litigant. The ends of Justice may be as completely defeated by a false affidavit as by false testimony on oath. In cases like the present, false affidavits may have the effect of postponing, and even defeating, the diligence of the law for enforcing payment of debt undoubtedly due.

The words of the Penal Code, (§ 278) as to false evidence, apply equally, whether the evidence is given verbally, in the witness box, or as a written statement, by way of affidavit. Falsehood, in written oaths, exactly corresponding to affidavits, has accordingly been punished in France.

There was a case, in 1806, decided in the Supreme Criminal Court of France, on appeal from the Court of Nice, which is quite in point.

The case was under the older Penal Code of 1791, but the words of the later Code are the same. It was then decided that: "Une déclaration mensongère, faite volontairement, et hors procès, devant un officer public, ayant caractère pour la recevoir, constitue le délit de faux témoignage, en matière civile, passible de six années de fers."

These facts were these.

"Paul Bonaventure Thiberti s'était présenté en l'an 10, devant le Juge de Paix de la Commune de Villefranche (petite ville maritime a une lieue de Nice,) et là, accompagné d'Angélique Marie Manaurti, femme Asso, il avait requis acte de ce qu'il déclarait, avec serment, s'être trouvé, après le combat naval d'Aboukir, à l'hôpital militaire d'Alexandrie, couché à côté d'un homme qui lui dit se nommer Antoine Asso, marié à Villefranche, où résidait encore son épouse et ses enfants; que ce nommé Asso était atteint d'une maladie scorbutique et que lui Thiberti, l'avait vu expirer.

Munie de cette déclaration, la femme Asso envola à de secondes noces.

Bintôt Asso reparut.

Thiberti fut poursuivi comme prévenu de faux témoignage en matière civile; et la Cour de Justice Criminelle spéciale de Nice, pensant que sa déclaration constituait un pareil délit, lui appliqua l'article 47 de la seconde section du Titre 2 de la seconde partie du C. Pénal."

Thiberti appealed, but the decision of the inferior Tribunal was maintained, by the following arrêt: "La Cour, considérant que l'art. 47 du Code Pénal, au titre des crimes et délits contre les propriétés, veut que le crime de faux témoignage, en matière civile, soit puni de 6 années de gêne; qu'on ne peut mettre de restriction à la généralité de cette disposition; qu'il n'est pas nécessaire qu'une déclaration, dont les suites peuvent devenir dangereuses pour quelqu'un, ou préjudiciables à l'ordre public, ait été faite dans le cours d'une instance liée; qu'il suffit que cette déclaration mensongère ait acquis un caractère public, devant un officier ayant caractère pour la recevoir, pour qu'elle doive être considérée comme un faux témoignage, en matière civile, et qu'elle appelle sur son auteur, la peine que la loi prononce; qu'il est dès lors évident, que le moyen invoqué par Paul Bonaventure Thiberti, et qu'il voudrait faire résulter de la fausse application de la loi, doit être écarté; rejette etc."

So again, where the seamen, on board of a ship, which had been wrecked, appeared before a Magistrate, to whom the Captain reported the circumstances, and made false declarations on oath, they were held guilty of giving false evidence in a civil matter: 17th September 1836. Court of Cassation. S. V. 36—1—817. "La fausse déclaration faite, sous la foi du serment, par les gens de l'équipage d'un navire naufragé, devant le Juge auquel le Capitaine fait son rapport, sur le naufrage du navire et ses causes, constitue le crime de faux témoignage, en matière civile."

CASS 6. Nov. 1806. (S. 6. 1. 523. C. N. 2. D. A. 12. 608.)
CASS. 24 Nov. 1808. (S. 9. 1. 378. C. N. 2 D. A. 12. 610)
CHAUVEAU ET HÉLIE. T. 4. P. 456.
GILBERT, Penal Code of France. sect. 363.

THE PROCUREUR GENERAL continued:

It is of no moment that witnesses may not be examined in France in their own civil causes. The question is: was the evidence in the case in question, being by way of affidavit, *lawful*? If so, whether by party or by a disinterested witness, it may be punished if it was false.

False testimony, by a party examined as a witness, before a District Court, would certainly be punishable, altho, at the date of the Penal Code, such evidence was inadmissible.

On authority and practice therefore, as well

The English law quite accords with that of France as to perjury in an affidavit being an indictable offence. ARCHBOLD'S *practice* p. 649. 650. 651. 653 *and cases there cited.* And affidavits are, in 24 and 25 Vict. C. 134 sect, 50, included expressly under the word *evidence*, the French equivalent of which is " témoignage. " (See translation of Article 278, Colonial Penal Code.)

2o The false swearing is also expressly made a crime, by Ordinance 30 of 1855, sect. 7 ; which in effect imports into the law of the Colony the provisions of the Statute 17 and 18 Vict. C. 125, which (Sect. 21) contains an express provision of the punishment of false affidavits.

It is said that the Colonial law required special provisions for the punishment of falsehood in affidavits, under the Bankruptcy Ord. No. 33 of 1853, and therefore false affidavits in the other cases are plainly not punishable.

But the provisions, in that Ordinance, were not intended to be declaratory of the general rule on the subject, but to be precise on the rules applicable to one class of affidavits.

The provision is borrowed from the English Bankrupt Statute, 12 and 13 Vict. C. 106, which provides specially as to perjury in affidavits made under it, altho, there is no doubt that, under the English Common Law, all false affidavits are punishable.

As this special provision of the English law did not indicate any doubt, far less any opinion by the British Legislature, as to the punishment of affidavits in England, no more can the special provisions of the Colonial Bankrupt Ordinance show that, in the cases not there provided for, perjury in affidavits is no crime.

In the Criminal Procedure Ordinance of 1853, (No. 29) the form of setting forth charges for perjury, or falsely swearing affidavits, *interalia*, is given. That proves that the false swearing of affidavits was a crime before the Baukruptcy Ordinance was passed.

II. The plea of *Autrefois acquit* cannot hold. The prisoners have never been tried. No evidence has ever been adduced against them. The District Magistrate, instead of receiving evidence, decided in point of law that there was no crime charged.

The accused having therefore never been tried have not been acquitted.

Besides, the Plea of *Autrefois acquit* must set forth a judgment of acquittal by a Court of competent jurisdiction. (Crim. Proc. Ord. Sect. 74.) Whereas the plea in this case sets forth a mere dismissal of the case, not an acquittal, by a Magistrate whose powers are merely to make preliminary inquiry in such cases, in which it is expressly provided he has no jurisdiction; Ordinance No. 35 of 1852 sect, 102 (16.) As the Magistrate could not lawfully convict or acquit, having no "jurisdiction," his judgment dismissing the case cannot found a plea of *autrefois acquit* (STEPHEN'S *Commentaries.* II. 404 CHITTY on *Crimes*, 1. 452. ARCHBOLD'S *practice*, p. 116. That last author gives the true test of such a plea being well founded, namely, that the accused was tried on an Indictment under which he could lawfully have been convicted. Tried by that test, in the present case, the plea altogether fails.

The Judgment of dismissal of the District Magistrate not being subject to appeal, could only be dealt with by my bringing the matter on a new Information, or on a motion for a *Mandamus*, on the Magistrate, to make a preliminary inquiry. I preferred the former course, in exercise of the powers conferred by Criminal Proc. Ordinance, Sect. 38. 39.

It were monstrous to suppose that the judgment of a District Magistrate dismissing an Information, without a trial, in a case which he has no jurisdiction to try, could be final. No authority is adduced, by the Defendant's Counsel, indicating the slighest ground for such a principle. On the contrary, the power of the Public Prosecutor, to bring the case before this Court, is unlimited. In practice he usually does so after preliminary Inquiry by a Magistrate. He may do so without such Inquiry, which is not compulsory. (So held by SIR JEAN EDOUARD RÉMONO in *R. V. St. Ange.* 21st September 1859), and the failure of his attempt, to get a preliminary inquiry made, on account of the Magistrate, with limited jurisdiction only to inquire, having erroneously given a judgment dismissing the case, cannot exclude him from that right.

But the argument, on the other side, may be here tested by the consideration that, even an acquittal by a Grand Jury, don't support a plea of *Autrefois acquit* : (*Stephens Commentaries, ut Suprd,* CHITTY, page 458.) And after such an acquittal a New Indictment may be laid before another Grand Jury.

It is evident that the refusal of a Magistrate to convict, on the ground that he held the offence charged not to be punishable, could not have an effect greater than that of a decision by a Grand Jury refusing to find a true Bill.

On these grounds the plea of *autrefois acquit* cannot be maintained.

MR. LIONNET, *in reply.* I don't criticise the Law of England at all here, as I maintain that it has no application to this Colony. The decisions which are cited, from the Courts of France, apply to cases of third parties, not as in this instance where one of the actual parties to the Civil suit, is accused of giving false evidence wilfully, The authority of the

case of *Thiberti* mainly relied upon, on the other side, is disputed in the Treatise of Chauveau and Hélie because there was there a statement in writing, which brought it within another prevision of the law, and Thiberti was not a party to the case himself.

1c. As regards the terms of the Bill Ordinance of 1855, if we were to believe the Procureur General, we have, by virtue of its provisions, lost our own law, and got the whole English criminal law imposed upon us. But, in the matter of crimes, such mere general legislation is of no effect. Again, "perjury" is one thing, and "giving false evidence" by our own and the French Law, is another.

2o. As to the answer, to my plea of *Autrefois acquit*, I reply: the District Magistrates of Mauritius have nothing to do with the Grand Juries, known in English practice. Two of the former functions of our Criminal Law are merged in him. He is, to a certain extent, the *Juge d'instruction*, and exercises the functions of the *Chambre de mise en accusation*. If he finds there is no real, proper charge, he at once dismisses it, as he is specially authorized to do so, under article 7 of Ordinance No. 35 of 1852. If the Procureur General was not present, it was his own fault, the District clerk sends weekly, to him, a full notice of all the cases coming on, and we are not to suffer by his absence. (See article 89 of the Ordinance above quoted.)

It is said that the Magistrate had no jurisdiction, but as there is no punishment for this offence in our Code, no Court, in this Colony, has jurisdiction in it. The Crown, if it wished to reopen the matter, should have appealed to this Supreme Court, by a writ of *Certiorari*.

JUDGMENT.

Looking at this Case, merely in the light thrown upon it by the French authorities, there can, we apprehend, be no doubt that the Information sets forth a serious crime, which would be recognizable by the Law and practice of that country. The crime *Faux* or Falsehood (*crimen falsi*) has been defined, by the Cour de Cassation itself, in these terms: "l'altération de la vérité, dans une intention criminelle qui a porté, ou pu porter préjudice à des tiers." 12th July 1856. S. V. 35 : 1 : 591.

So, three things are necessary to constitute the crime: *l'altération de la vérité. l'intention de nuire, la possibilité d'un préjudice.* C. *Cass.* 19 December 1835, *Dalloz périodique*, 43 : 1 : 236. Assuming, in the meantime, as we are bound to do, that the Crown can substantiate in evidence, the whole of the facts of the Information, it is abundantly clear that all these three elements concur in the present case.

But we must next inquire: does the criminal matter here set forth, amount to the crime of "giving false evidence in a civil matter," under the Penal Code of Mauritius. It appears to us, that it does, looking merely, in the meantime, at the French authorities, particularly those of *Thiberti*, and the case of the mariners referred to in the argument. Indeed, in many respects, the facts of the present case are stronger than in those examples. Here, there was a solemn and deliberate oath, made to a falsehood, in a matter about which Madame Rozan could have no doubt whatever, namely: whether or not she endorsed the promissory note in question. The oath was taken before the Chief Judge of the Colony, sitting and performing the functions belonging to his office, under the Ordinance of 1855, regulating a matter eminently civil. The accused subscribed the falsehood with her name, and used the falsehood not only spoken but written, as a stay of justice, against the holder of the note. But it is said that Madame Rozan could not give evidence, and her Counsel so distinguished this case from those of *Thiberti* and the sailors, who swore falsely, for the third parties; but here the French authorities are again unfavourable to the accused. In the *Cour de Cassation*, 29th June 1843. S. V. 4 : 41 : 58, it was determined that, where a party, who was under a legal incapacity to give evidence in the case, had, nevertheless, appeared and sworn falsely, he was guilty of giving *faux témoignage*, and the principle of this decision was affirmed in another case, before the *Cour de Cassation*. 27th June 1811. Chauveau and Hélie, Vol. IV. page 433.

Therefore, if we were to confine our considerations to the older law of the Colony, and the expositions of that law, furnished by the authorities of France, we should have no difficulty in sustaining the present Information as setting forth a sufficient charge of giving false evidence. In the later legislation of the Island, affidavits are not only recognized, but in the Ordinance of 1855 they are stated as the evidence, and means by which persons, in the position of Madame Rozan, are to secure the benefits of that enactment. This is plain upon the face of the Ordinance, and its Schedule, without looking at all to the reference, in Sect. 7, to certain English Acts of Parliament and accessories, which reference is made, it must be admitted, in a very vague and unsatisfactory way. We therefore sustain the Criminal Information now before us.

2. On the other plea of *Autrefois acquit*, we forbear giving any opinion. It will probably be raised, at the trial, before the Jury, whose province it is to decide it, under the direction of the presiding Judge.

The Court, therefore gives Judgment in favor of the Crown and finds that the Information does set forth a crime, punishable by the Law of this Colony, and that both prisoners may be lawfully tried under the same, accordingly as they are respectively charged in the said Information.

Court of Assizes.

RES JUDICATA,—AUTREFOIS ACQUIT.

1o. *Il n'y a point chose jugée, lorsque la question à décider n'a pas été soulevée et débattue.*

2o. *Lorsque le prévenu plaide* Autrefois acquit, *et qu'il n'existe point de contestations sur les points de fait, la Cour peut décider les points de droit sans un Jury.*

3o. *Lorsque le prévenu plaide* Autrefois acquit *il doit produire un acte d'acquittement par une Cour compétente, et sur les mêmes chefs d'accusation, et en fait et en droit, que ceux auxquels il défend.*

RES JUDICATA,—PLEA OF "AUTREFOIS ACQUIT."

1. *Where the question has not been raised and discussed there can be no* res judicata.

2. *Where, on a Plea of* "Autrefois acquit," *there is no dispute as to the facts, the Court may decide the question of law, without a Jury.*

3. *To sustain a Plea of* Autrefois acquit, *there must have been an acquittal, by a competent Court, on a charge, the same in fact and law as the one now preferred.*

THE QUEEN,

Versus.

WIDOW ROZAN AND ATE DURASSIER.

Before:
THE FULL BENCH.

The Hon. W. G. DICKSON,—Procureur and Advocate General.
E. NOLIN,—Crown Solicitor.
A. LIONNET,—of Counsel for prisoners.
C. LABORDE,—Attorney for same.

12*th March* 1862.

This case was argued, for the first time, on the sixteenth December 1861, before the three Judges.

On the twenty fourth February last, the Court gave Judgment, in favor of the Crown, on the second plea pleaded by the two accused, on their arraignment, and adjudged 'that the 'Information does set forth a crime punishable by the Law of Mauritius," and therefore sustained the Criminal Information filed.

"On the other plea of *Autrefois acquit*" says the Judgment, "we forbear giving any 'opinion. It will, probably, be raised at the 'trial, before the Jury, whose province it is 'to decide it, under the direction of the presiding Judge."

This "forbearance," on the part of the Court, has given rise to a motion, on the part of the Honorable the Procureur and Advocate General, which was heard, by consent, between him and Lionnet, of Counsel for the parties charged, on the 5th. March instant.

The motion runs in these words: "The "Honorable the Procureur and Advocate "General moves that the Court do decide, "on the plea of *Autrefois acquit*, pleaded in "defense, by the prisoners, without the in-"tervention of a Jury, in respect that plea "involves only matter of law, as applicable to "facts admitted on both sides."

In support of his motion the learned Crown Counsel said:

The question is whether the plea of *Autrefois acquit* is for the Court or for a Jury to decide on, that depends upon whether it raises matter of law only, on the one hand, or matter of fact, or mixed fact and law, on the other hand.

In this case there is only matter of law, pure and unmixed with any disputed question of fact. The parties are at one upon all the facts involved in the plea; they have all along argued the question, as on facts undisputed, and there is therefore no question of fact for a Jury to solve.

The question is only as to the effect, in law, of the Judgment of Magistrate Esnouf, admitted by both parties to apply to the prisoners at the bar, and to the offence for which they are now charged, and involves mere questions of law, viz: 1o. the Jurisdiction of the Magistrate to dispose of such a case finally; 2o. the effect of a decision, by him, dismissing the Information laid before him, but on grounds of law and without hearing evidence; 3o. and the question whether any such decision amounts to an acquittal on which the accused can plead *Autrefois acquit*.

In general, no doubt, the plea of *Autrefois acquit* raises matter of fact, as well as law, *e. g.* the identity of the accused, in the first and second cases, and the identity of the two offences charged; and in all such cases the question of fact must go before a Jury. This is the general rule; and it is accordingly stated by ARCHBOLD'S *Crim. Plead.* (P 119) generally, that a Jury must be empanelled to try the plea of *Autrefois acquit*. But that author does not notice exceptional cases in which only matter of law is involved. The cases he cites, in support of his dictum, were of mixed fact and law. But, in Welsh's case, (1 *Moody's Cr. Cases*, 175) and *Vandercomb and Albot* 2 *Hawkins* Pl. C, where questions of pure law were involved in a plea of *Autrefois acquit*, the Court disposed of the plea without a Jury

record, to have been actually made, and the Appellant positively denies that any farther admission was made; and as the Plaintiff led no proof whatever, it appears to the Court that the safer course is to allow a rehearing of the case. The judgment of the Magistrate is therefore hereby recalled, and the case remitted to be reheard, the Magistrate to have full power to dispose of all questions of costs, past or future, in his Court.

In the Appeal, costs to neither party.

Supreme Court.

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—RÉCLAMATION DE DOMMAGES ET INTÉRÊTS.

APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE,—CLAIM OF DAMAGES.

Number of Record. 275
P. MAYEPA, Appellant.
Versus.
MARJANE, Respondent.

Before:
The Honorable SIR J. E. RÉMOND 1st P. J.

C. M. CAMPBELL,—of Counsel for Appellant.
U. HITIÉ,—Appellant's Attorney.
J. ROUILLARD,—of Counsel for Respondent.
A. J. COLIN,—Respondent's Attorney.

4th February 1862.

This was a case before the District Magistrate of Pamplemousses for the payment of the sum of two hundred and fifty dollars for damages for the prejudice and loss which the Appellant alledges he has sustained in consequence of the taking away of a dry wall which existed on his property, with costs of suit.

The District Magistrate proceeded to hear, on the 12th September 1861, and closed the evidence, the same day, and ordered that inspection of the locality should take place on monday the sixteenth of the same month of September, at which the parties should attend if they thought fit to do so.

It appears from the record that the case was heard before the District Magistrate, on the 19th September, but no mention is made of the Inspection which had been ordered, but on the other hand the case was proceeded without any opposition or observation of the parties, and this last fact induces this Court to admit that the District Magistrate has acted in conformity with the order of the 12th of September. Moreover the Appellant has not in his grounds of appeal, specified that the Inspection of the locality, ordered the 1st September, has been neglected.

In consequence, finding that the Plaintiff, now Appellant, has not proved his plaint, appeal is dismissed with costs.

Supreme Court.

SUCCESSIONS IRRÉGULIÈRES.—ENFANTS NATURELS,—ENVOI EN POSSESSION.—ART. 766 C. C.

SUCCESSIONS ACCRUEING TO NATURAL CHILDREN,—MOTION TO BE SENT IN POSSESSION OF GOODS DEPENDING THEREFROM.—ART. 766 OF C. C.

Ex parte:
J. N. RAGOT.

Before:
The Hble. SIR J. E. REMOND 1st P. J. and
The Hble. N. G BESTEL, 2nd P. J.

4th February 1862.

The application of Joseph Numa Ragot has proved to Court that he is the natural son of Marie Louise Rosalie Ragot, who was natural daughter of Marie Louise Ragot and natural sister of Pierre François Proponier and Joseph Marie Ragot, and that those persons have died without leaving any legitimate heirs or natural representatives whatever, and that he, the said Joseph Numa Ragot is called, by the terms of Article 766 of the Civil Code, to receive the Successions claimed by him, with the consent of the Ministère Public.

In consequence, Joseph Numa Ragot is hereby sent into possession of all the properties of Marie Louise Rosalie Ragot, his mother, of Marie Louise Ragot, his grand mother, and of Pierre François Proponier and Joseph Marie Ragot his natural uncles.

Supreme Court.

DIVORCE,—ANNÉE D'ÉPREUVE, — ARTICLE 260 C. C.

DIVORCE,—"ANNÉE D'ÉPREUVE," —ARTICLE 260 OF C. C.

Number of Record: 5506

BLANCARD THE WIFE, Plaintiff.
Versus.
J. I. BLANCARD THE HUSBAND, Defendant.

Before.
The Honorable SIR J. E. RÉMOND 1st P. J. and
The Honorable N. G. BESTEL 2nd P. J.

A. LIONNET,—of Counsel, for Plaintiff.
C. LABORDE,—Plaintiff's Attorney.
4th March 1862.

(*See Volume* 1. *Page*. 5.)
Mr. Lionnet, of Counsel for the Plaintiff,

moves the Court to pronounce final judgment, in this case, the year's delay fixed by the Court having expired.

The Defendant does not appear, though duly summoned.

Mr. Douglas, Substitute Procureur and Advocate General, states that, as Ministère Public, he has nothing to say against the demand.

The Court finally pronounces the divorce prayed for.

Supreme Court.

JUGEMENT OBTENU CONTRE UNE SOCIÉTÉ,—EXÉCUTION DU JUGEMENT CONTRE L'UN DES MEMBRES DE LA SOCIÉTÉ.

JUDGMENT GIVEN AGAINST PARTNERSHIP,—EXECUTION OF THE JUDGMENT AGAINST ONE OF THE MEMBERS OF THE PARTNERSHIP.

A. REYNAUD & Co., Plaintiffs.
Versus.
A. BERNARD & Co., Defendants.

Before.
His Honor the CHIEF JUDGE and the Honorable N. G. BESTEL, 2nd P. J.

J. L. COLIN,—of Counsel for Plaintiffs.
E. DUCRAY,—Plaintiff's Attorney.

11th March 1862.

On the 4th day of this present month of March, the Plaintiffs, by their Counsel Mr. J. L. Colin, moved this Court ex-parte, for a Rule authorizing the Registrar to issue writs of *Fi. Fa.* and of *Ca. Sa.* in the above cause, against Victor Bernard, as being a member of the firm A. Bernard and Co., persuant to a judgment entered up, in the Registry of this Court, on the 24th February last, at the request of the said Plaintiffs against the said Defendants, for the recovery of the amount of a promissory note with costs against the said Victor Bernard.

Mr. S. J. Douglas, as Substitute Procureur and Advocate General, having objected to such motion being made ex-parte.

The Court took time to consider.

And, on the 6th, the Court rules that the Defendant, Victor Bernard, must bessummoned to answer the Plaintiffs, application, if he thinks proper, and intimates that, without his being called upon to appear in Court, the motion cannot be entertained by the Court.

And, on the 11th March, the said Victor Bernard having been called upon as above intimated, and leaving default, J. L. Colin, of Counsel for Plaintiffs, moved the Court for the writs above prayed for.

Motion granted.

Bail Court.

MANDANT ET MANDATAIRE.

Circonstances d'après lesquelles la Cour a décidé qu'un acquéreur de marchandises, par l'intermédiaire d'un agent, ne pouvait se refuser au paiement du prix des dites marchandises, lorsque l'agent, habituellement chargé de faire ce paiement, était tombé en déconfiture.

PRINCIPAL AND AGENT

Circumstances in which the Court held that there was no special defence open to the purchaser of goods through an agent, against payment of the price, where the agent who usually paid the price had failed.

Number of Record : 3089

MOUTOU & Anor. Plaintiffs.
Versus.
GODER, Defendant.

Before:
His Honor the CHIEF JUDGE.

E. BAZIRE,—of Counsel for Plaintiffs.
V. PRAGASSA,—Plaintiff's Attorney.
G. B. COLIN,—of Counsel for Defendant.
A. J. COLIN,—Defendant's Attorney.

16th May 1862.

The Defendant Goder, a shop keeper at Flacq, was in the habit, during the years 1858, 1859 and 1860, of employing A. Mariette a general agent in Port Louis, on commission to purchase and send to him, various articles, which he required, for the purposes of his trade. No instructions as to where he was to purchase the goods were sent to Mariette. He was in the habit of procuring some of the supplies from Plaintiffs, who then kept a store in Port Louis.

The course of dealing, so far as disclosed by the evidence in the case, which was very meagre, was the following: On receipts of Defendant's orders, Mariette procured the articles, from the Plaintiffs, communicating the names of the Defendant as the purchaser, and granting *Bons* for the articles *pour compte de Mons. E. Goder*; Mariette forwarded the articles to the Defendant at Flacq. Once a month, after receipt of the goods (or some times two or four weeks later,) Mariette, as the agent of the Defendant so disclosed, paid the price to the Plaintiffs, and took credit in his account, with the Defendant, for the sums so paid. There was no evidence that Plaintiffs knew Goder, except through the representation of Mariette.

Mariette failed on fifth November 1860, at which time there was due the Plaintiffs, the sum of $ 329. 20, for the following articles supplied to Defendant. in the above manner; 1860,

September 3rd — 20 sacs avoine..	$ 58.20
September 29th — 10 sacs ris....	$ 46
October 12th — 50 sacs gram....	$ 225
	$ 329.20

Mariette deposed: "When I stopped payment Goder" (the Defendant) "was due $ 6,000, for the goods I had bought for him, and I was due him $ 2,900." No demand for payment appears to have been made by the Plaintiffs, till nineteenth September 1861, when the present suit was entered against Goder. The case was partly heard in November last, but, at the request of parties, was allowed to stand over, till this term.

Bazire, for Plaintiffs, contended: The case is quite a clear one. The goods were sold and delivered, through the Defendant's agent, to the Defendant, who must, of course, pay the price. We dealt really with the Defendant throughout, and all the accounts were rendered in his name. He knew the course of dealing, he homologated, and ratified the whole proceedings, and now that the agent has failed, and he can't pay us we, of course, sue the Defendant.

G. B. Colin, for Defendant: It is a mistake to suppose that the case is a clear one against the Defendant. There are three grounds on which I contend he should not be held liable. First, according to the course, of dealing, Goder paid every month, or occasionally at a somewhat later period, through Mariette, to whom he sent the money. At the date of the failure of the latter, there was a large sum in his hands, which he ought to have applied to pay Goder. It would be a gross abuse to say that, if I send my servant daily to the Banque with ready money, and he latterly changes the course of dealing. and takes up goods, in my name, on credit. I shall be liable to pay them, on my servant failing to do so. There was here a change in the course of dealing for which I am not responsible. Instead of settling monthly, or so, they waited nearly one year, before they made the demand. (Paley, *Principal and Agent*. Page 246.)

Secondly.—The Plaintiffs don't allege that they ever settled with my client, they looked to Mariette alone and adopted him as their true and only debtor. In fact I never knew anything of the Plaintiffs, or that I had any dealings with them I gave to Mariette no order to go to their store, in quest of articles for me. They dealt really with Mariette, who was then in good credit. It is only on his failure, as an afterthought, that they attempt to fall back on me.

Thirdly.— In any view, the extension of time, here given by the Plaintiffs, is fatal to their demand. Instead of asking payment, at the end of the two months, when they would have found money placed in Mariette's hands, by the Defendant, for their payment, they allowed nearly one year to elapse. (Smith's *Leading Cases*. V. 2 Page 198. Particularly the notes: *Paterson* & other cases. Smith's *Compendium of mercantile law*. Page. 131. 132.)

The French authorities are to the same effect: Sirey 1832. 1. 776. 2 cases. Toullier. V. 11. Numbers 25, 26 Duranton V. 18 Page 218.

JUDGMENT.

This case, like every other, must be determined with reference to the precise facts which have been established in evidence. The whole law of Principal and Agent is founded on the every day quoted maxim: *Qui facit per alium, facit per se.* Applying this rule to the present case, the Defendant Goder bought the articles in question, through Mariette, from the Plaintiffs, and therefore having got delivery of the goods, he is *primafucie*, at least, necessarily bound to pay the price to the Plaintiffs. The purchases made by Mariette, from the Plaintiffs, were clearly within the scope of his general employment, and therefore, delivery of the goods having been made, the Defendant unless he shews cause to the contrary is liable to pay the price.

So standing the matter, how does Goder justify his present refusal to pay the price. He says *first*: There was a change in the course of delivery, by the Plaintiffs, 2ndly. The Plaintiffs really looked on Mariette, as their debtor, and relied solely on him; and 3rdly, the delay in making the demand for payment is fatal to their claim.

Now let. Had there been any charge in the way and manner in which the transactions were carried on, prejudicial to the interests of the Defendant, this plea might have been a good one. If the Plaintiffs, instead of getting paid at certain fixed times, had granted credit to Mariette really beyond those terms, and he, after recovering money from the Defendant to pay Plaintiffs, had failed without doing so, the Plaintiffs could not have recovered against Defendant. But the evidence in this case above recited does not disclose such a state of matters.

If the second defence were proved in evidence there is no doubt that it would be a good one. A seller through an agent or broker, (in the present case it is unnecessary to distinguish them,) may so conduct himself as to adopt the agent, as his sole debtor, and liberate the principal. This will necessarily require to be very clearly established in point of fact. The evidence in this case does not at all support the position.

As to the third defence, it is not established At the date of Mariette's failure, no part of the account was due, above what may fairly be said to have been the ordinary term of credit, and the far larger part of the account was owing for a considerably less period. Accordingly no undue delay in demanding payment so as to raise a special defence for Goder, really took place.

Farther, the Defendant was then due his vendors more than twice the amount owing to him by Mariette; so pratically, much less loss accrued to the Defendant than often occurs in such case Mariette being insolvent, the accouut could not be paid by him, and the Plaintiffs went against the principal, who cannot complain that a delay of some months took place, before he was sued;

Judgment for Plaintiffs, with costs.

Caption of the body limited to three years.

Vice Admiralty Court.

CAPTURE D'UN NÉGRIER,—RESTITUTION.

Circonstances en vertu desquelles la Cour a ordonné la restitution, à ses propriétaires, d un Négrier capturé sur la Côte Orientale d'Afrique, par une des croisières de Sa Majesté, quoiqu'il eut été capturé pour de justes motifs.

CAPTURE OF A SLAVER,—RESTITUTION.

Circumstances in which the Court ordered a Slaver seized on the East Coast of Africa, by one of Her Majesty's cruisiers, to be restored to her owners, though captured with reasonable cause.

THE QUEEN, Promoveut.

versus.

The Ship called the BASHAIR, Impugnant.

Before:

His Honor C. FARQUHAR SHAND, Chief Justice.

The Hble. W. G. DICKSON Esqre, Procureur & Advocate General, Queen's Advocate.
J. BOUCHET—Proctor.

A. LIONNET Esq,—of Counsel for the owners of the *Bashaïr*.
C. LABORDE—Proctor for same.

2nd June 1862.

In this case, His Honor the Chief Justice, as Worshipful Judge of the Vice Admiralty Court, after reciting the pleadings and arguments of parties, at great length, delivered Judgment as follows:

It will be remembered that the case of the Promovent is that the *Bashaïr* was a slaver, belonging to a subject or subjects to the Imaum of Muscate, and liable to condemnation, under the Convention with that State, and the relative Act of Parliament, as having been found and seized in forbidden waters.

1—In the first place, we have to consider the question which lies at the root of the whole matter here. Was this Vessel, when captured, engaged in the slave trade? Or, to state the precise issue, which has been raised and accepted by both parties, was she under the Statutes for the suppression of the slave trade, and were there slaves on board the *Bashaïr*, when she was seized by the *Sidon*?

It appears to the Court that this part of the case of the Promovent has been established in evidence.

The Impugnant himself admits that he was at one time, in the habit of dealing in slaves, and carrying them in the *Bashaïr*, and this is corroborated by the evidence of several witnesses.

The original character of the Impugnant and his ship are thus established in the outset. The ordinary legal presumption therefore, in favor of a party whose conduct is impeached, cannot operate in his favor here, and a status, so to speak, is fixed on the Impugnant, and a character on his ship, which it will not be easy for him to renounce, except by the most conclusive evidence, that he had utterly abandoned such practises altogether, and betooken himself to the more legitimate pursuits of commerce.

Now has he proved that he had ceased to traffic in slaves at the time of the capture? It appears to the Court that he has not. It is very material to observe that while he stated to the British Consul, at Zanzibar, (as the Pass of that functionary, found on board the *Bashaïr*, bears.) that he had 34 persons of crew and passengers, and no slaves, the Impugnant is found at sea, 4 days afterwards, with the said crew and passengers and 5 additional persons, having every characteristic of being slaves; physical appearance, dress, language, habits and manner, as evinced during their association with slaves (on board the *Sidon*), who had some time previously been captured in other Dhows.

Some of these 5 persons have been examined in this cause, and deposed to their having been forcibly seized and carried of as slaves. Attempts were made to conceal them, when the *Bashaïr* was boarded by the boats of the *Sidon*, evincing a guilty knowledge on the part of the Impugnant, that these were persons whose presence, on board of his vessel, would turn to his disadvantage. Then, seven pairs of iron shackles,—of that peculiar construction which a witness of experience, and intelligence, tells us are to be found only on board of slavers in those seas,—are discovered

record, to have been actually made, and the Appellant positively denies that any farther admission was made; and as the Plaintiff led no proof whatever, it appears to the Court that the safer course is to allow a rehearing of the case. The judgment of the Magistrate is therefore hereby recalled, and the case remitted to be reheard, the Magistrate to have full power to dispose of all questions of costs, past or future, in his Court.

In the Appeal, costs to neither party.

Supreme Court.

Appel d'un Jugement de Magistrat de District,—Réclamation de Dommages et Intérêts.

Appeal from a Judgment of District Magistrate,—Claim of Damages.

Number of Record. 275.
P. MAYEPA, Appellant.
Versus.
MARJANE, Respondent.

Before:
The Honorable Sir J. E. Rémond 1st P. J.

C. M. Campbell,—of Counsel for Appellant.
U. Hitié,—Appellant's Attorney.
J. Rouillard,—of Counsel for Respondent.
A. J. Colin,—Respondent's Attorney.

4th February 1862.

This was a case before the District Magistrate of Pamplemousses for the payment of the sum of two hundred and fifty dollars for damages for the prejudice and loss which the Appellant alledges he has sustained in consequence of the taking away of a dry wall which existed on his property, with costs of suit.

The District Magistrate proceeded to hear, on the 12th September 1861, and closed the evidence, the same day, and ordered that inspection of the locality should take place on monday the sixteenth of the same month of September, at which the parties should attend if they thought fit to do so.

It appears from the record that the case was heard before the District Magistrate, on the 19th September, but no mention is made of the Inspection which had been ordered, but on the other hand the case was proceeded without any opposition or observation of the parties, and this last fact induces this Court to admit that the District Magistrate has acted in conformity with the order of the 12th of September. Moreover the Appellant has not in his grounds of appeal, specified that the Inspection of the locality, ordered the 1st September, has been neglected.

In consequence, finding that the Plaintiff, now Appellant, has not proved his plaint, appeal is dismissed with costs.

Supreme Court.

Successions Irrégulières.—Enfants naturels,—Envoi en possession.—Art. 766 C. C.

Successions accrueing to natural children,—Motion to be sent in possession of goods depending therefrom.—Art. 766 of C. C.

Ex parte:
J. N. RAGOT.

Before:
The Hble. Sir J. E. Rémond 1st P. J. and The Hble. N. G Bestel, 2nd P. J.

4th February 1862.

The applicaeion of Joseph Numa Ragot has proved to Court that he is the natural son of Marie Louise Rosalie Ragot, who was natural daughter of Marie Louise Ragot and natural sister of Pierre François Proponier and Joseph Marie Rigot, and that those persons have died without leaving any legitimate heirs or natural representatives whatever, and that he, the said Joseph Numa Ragot is called, by the terms of Article 766 of the Civil Code, to receive the Successions claimed by him, with the consent of the Ministère Public.

In consequence, Joseph Numa Ragot is hereby sent into possession of all the properties of Marie Louise Rosalie Ragot, his mother, of Marie Louise Ragot, his grand mother, and of Pierre François Proponier and Joseph Marie Ragot his natural uncles.

Supreme Court.

Divorce,—Année d'épreuve, — Article 260 C. C.

Divorce,—"Année d'épreuve," —Article 260 of C. C.

Number of Record: 5506

BLANCARD the wife, Plaintiff.
Versus.
J. I. BLANCARD the husband, Defendant.

Before.
The Honorable Sir J. E. Rémond 1st P. J. and The Honorable N. G. Bestel 2nd P. J.

A. Lionnet,—of Counsel, for Plaintiff.
C. Laborde,—Plaintiff's Attorney.
4th March 1862.

(*See Volume* 1. *Page*. 5.)

Mr. Lionnet, of Counsel for the Plaintiff,

moves the Court to pronounce final judgment, in this case, the year's delay fixed by the Court having expired.

The Defendant does not appear, though duly summoned.

Mr. Douglas, Substitute Procureur and Advocate General, states that, as Ministère Public, he has nothing to say against the demand.

The Court finally pronounces the divorce prayed for.

Supreme Court.

JUGEMENT OBTENU CONTRE UNE SOCIÉTÉ,—EXÉCUTION DU JUGEMENT CONTRE L'UN DES MEMBRES DE LA SOCIÉTÉ.

JUDGMENT GIVEN AGAINST PARTNERSHIP,—EXECUTION OF THE JUDGMENT AGAINST ONE OF THE MEMBERS OF THE PARTNERSHIP.

A. REYNAUD & Co., Plaintiffs.
Versus.
A. BERNARD & Co., Defendants.

Before.
His Honor the CHIEF JUDGE and the Honorable N. G. BESTEL, 2nd P. J.

J. L. COLIN,—of Counsel for Plaintiffs.
E. DUCRAY,—Plaintiff's Attorney.

11th March 1862.

On the 4th day of this present month of March, the Plaintiffs, by their Counsel Mr. J. L. Colin, moved this Court ex-parte, for a Rule authorizing the Registrar to issue writs of *Fi. Fa.* and of *Ca. Sa.* in the above cause, against Victor Bernard, as being a member of the firm A. Bernard and Co., persuant to a judgment entered up, in the Registry of this Court, on the 24th February last, at the request of the said Plaintiffs against the said Defendants, for the recovery of the amount of a promissory note with costs against the said Victor Bernard.

Mr. S. J. Douglas, as Substitute Procureur and Advocate General, having objected to such motion being made ex-parte.

The Court took time to consider.

And, on the 6th the Court rules that the Defendant, Victor Bernard, must be summoned to answer the Plaintiffs, application, if he thinks proper, and intimates that, without his being called upon to appear in Court, the motion cannot be entertained by the Court.

And, on the 11th March, the said Victor Bernard having been called upon as above intimated, and leaving default, J. L. Colin, of Counsel for Plaintiffs, moved the Court for the writs above prayed for.

Motion granted.

Bail Court.

MANDANT ET MANDATAIRE.

Circonstances d'après lesquelles la Cour a décidé qu'un acquéreur de marchandises, par l'intermédiaire d'un agent, ne pouvait se refuser au paiement du prix des dites marchandises, lorsque l'agent, habituellement chargé de faire ce paiement, était tombé en déconfiture.

PRINCIPAL AND AGENT

Circumstances in which the Court held that there was no special defence open to the purchaser of goods through an agent, against payment of the price, where the agent who usually paid the price had failed.

Number of Record: 3089

MOUTOU & Anor. Plaintiffs.
Versus.
GODER, Defendant.

Before:
His Honor the CHIEF JUDGE.

E. BAZIRE,—of Counsel for Plaintiffs.
V. PRAGASSA,—Plaintiff's Attorney.
G. B. COLIN,—of Counsel for Defendant.
A. J. COLIN,—Defendant's Attorney.

16th May 1862.

The Defendant Goder, a shop keeper at Flacq, was in the habit, during the years 1858, 1859 and 1860, of employing A. Mariette a general agent in Port Louis, on commission to purchase and send to him, various articles, which he required, for the purposes of his trade. No instructions as to where he was to purchase the goods were sent to Mariette. He was in the habit of procuring some of the supplies from Plaintiffs, who then kept a store in Port Louis.

The course of dealing, so far as disclosed by the evidence in the case, which was very meagre, was the following: On receipts of Defendant's orders, Mariette procured the articles, from the Plaintiffs, communicating the names of the Defendant as the purchaser, and granting *Bons* for the articles *pour compte de Mons. E. Goder*; Mariette forwarded the articles to the Defendant at Flacq. Once a month, after receipt of the goods (or some times two or four weeks later,) Mariette, as the agent of the Defendant so disclosed, paid the price to the Plaintiffs, and took credit in his account, with the Defendant, for the sums so paid. There was no evidence that Plaintiffs knew Goder, except through the representation of Mariette.

Mariette failed on fifth November 1860, at which time there was due the Plaintiffs, the sum of $ 329. 20, for the following articles supplied to Defendant. in the above manner; 1860,

September 3rd — 20 sacs avoine..	$ 58.20
September 29th — 10 sacs riz....	$ 46
October 12th — 50 sacs gram....	$ 225
	$ 329.20

Mariette deposed: "When I stopped payment Goder" (the Defendant) "was due $ 6,000, for the goods I had bought for him, and I was due him $ 2,900." No demand for payment appears to have been made by the Plaintiffs, till nineteenth September 1861, when the present suit was entered against Goder. The case was partly heard in November last, but, at the request of parties, was allowed to stand over, till this term.

BAZIRE, for Plaintiffs, contended: The case is quite a clear one. The goods were sold and delivered, through the Defendant's agent, to the Defendant, who must, of course, pay the price. We dealt really with the Defendant throughout, and all the accounts were rendered in his name. He knew the course of dealing, he homologated, and ratified the whole proceedings, and now that the agent has failed, and he can't pay us we, of course, sue the Defendant.

G. B. COLIN, for Defendant: It is a mistake to suppose that the case is a clear one against the Defendant. There are three grounds on which I contend he should not be held liable. First, according to the course, of dealing, Goder paid every month, or occasionally at a somewhat later period, through Mariette, to whom he sent the money. At the date of the failure of the latter, there was a large sum in his hands, which he ought to have applied to pay Goder. It would be a gross abuse to say that, if I send my servant daily to the Bazar, with ready money, and he latterly changes the course of dealing, and takes up goods, in my name, on credit, I shall be liable to pay them, on my servant failing to do so. There was here a change in the course of dealing for which I am not responsible. Instead of settling monthly, or so, they waited nearly one year, before they made the demand. (PALEY, *Principal and Agent*. Page 246.)

Secondly.—The Plaintiffs don't allege that they ever settled with my client, they looked to Mariette alone and adopted him as their true and only debtor. In fact I never knew anything of the Plaintiffs, or that I had any dealings with them I gave to Mariette no order to go to their store, in quest of articles for me. They dealt really with Mariette, who was then in good credit. It is only on his failure, as an afterthought, that they attempt to fall back on me.

Thirdly.— In any view, the extension of time, here given by the Plaintiffs, is fatal to their demand. Instead of asking payment, at the end of the two months, when they would have found money placed in Mariette's hands, by the Defendant, for their payment, they allowed nearly one year to elapse. (SMITH's *Leading Cases*. V. 2 Page 198. Particularly the notes: *Paterson* & other cases. SMITH's *Compendium of mercantile law*. Page. 131. 132.)

The French authorities are to the same effect: SIREY 1832. 1. 776. 2 cases. TOULLIER. V. 11. Numbers 25, 26 DURANTON V. 18 Page 218.

JUDGMENT.

This case, like every other, must be determined with reference to the precise facts which have been established in evidence. The whole law of Principal and Agent is founded on the every day quoted maxim: *Qui facit per alium, facit per se*. Applying this rule to the present case, the Defendant Goder bought the articles in question, through Mariette, from the Plaintiffs, and therefore having got delivery of the goods, he is *primafacie*, at least, necessarily bound to pay the price to the Plaintiffs. The purchases made by Mariette, from the Plaintiffs, were clearly within the scope of his general employment, and therefore, delivery of the goods having been made, the Defendant unless he shews cause to the contrary is liable to pay the price.

So standing the matter, how does Goder justify his present refusal to pay the price. He says *first*: There was a change in the course of delivery, by the Plaintiffs, 2ndly. The Plaintiffs really looked on Mariette, as their debtor, and relied solely on him; and 3rdly, the delay in making the demand for payment is fatal to their claim.

Now 1st. Had there been any change in the way and manner in which the transactions were carried on, prejudicial to the interests of the Defendant, this plea might have been a good one. If the Plaintiffs, instead of getting paid at certain fixed times, had granted credit to Mariette really beyond those terms, and he, after recovering money from the Defendant to pay Plaintiffs, had failed without doing so, the Plaintiffs could not have recovered against Defendant. But the evidence in this case above recited does not disclose such a state of matters.

If the second defence were proved in evidence there is no doubt that it would be a good one. A seller through an agent or broker, (in the present case it is unnecessary to distinguish them,) may so conduct himself as to adopt the agent, as his sole debtor, and liberate the principal. This will necessarily require to be very clearly established in point of fact. The evidence in this case does not at all support the position.

" one of us, situate in Hospital street, Port " Louis; and, on the last mentioned day " after examining upon oath the witnesses " called on both sides, and the documentary " evidence produced by the parties respectively " we have taken time to consider our decision.

" And after due consideration and delibe- " ration, on 3rd. April 1862, at eleven o'clock " P. M., in the presence of the attorneys of " the above named parties, the two arbitrators " have separately delivered their opinion in " the above cause, and the opinion of James " Edward Arbuthnot, one of the arbitrators " being in favor of the Plaintiff, whilst the " opinion of George Ireland was in favor of " the Defendant, the umpire George de Cour- " son has concurred in the opinion of the " said James Edward Arbuthnot.

" In consequence our judgment, in this " matter, for the reasons consigned in our " written opinions, which we have signed and " hereunto annexed, is that the said Defen- " dants E. Jérome and Co., are not entitled to " claim any damage or compensation from the " Plaintiff, who is entitled to have and hold " possession of the land in the declaration " mentioned.

" Costs against the Defendants."
(Signed :) " J. E. Arbuthnot.
(Signed :) " G. de Courson.
(Signed :) George Ireland."

The Plaintiff then called upon the Defendants to shew cause why the said award should not be made a Rule of Court, and receive due execution.

Mr. Bazire shewed cause: I am quite aware that I am not entitled to go into this case at large, but, without in the least degree imputing misconduct, far less dishonesty, to the arbitrators, I submit that their decision cannot stand, as they have irregularly gone much beyond their functions, and travelled into things and matters not before them. This is my only ground of objection.

They had indeed certain documents before them, and heard certain witnesses for the parties, but they have not at all appretiated these facts, and have arrived at a conclusion altogether erroneous. They are not infailible and have gone quite wrong in their Judgment.

His Honor the Chief Judge.—I fear we may wait a long time before we have infailible tribunals. We, Judges, make no such a claim. I assure you, in this Court, but we cannot review any error in judgment, (supposing we were satisfied that such existed) in a case like this. These arbitrators were probably better qualified than we are to dispose of such a question, besides they were selected by the parties themselves. They are not subordinate to this Court, like a Court of inferior jurisdiction, and subjected to its review. No malice, corruption or fraud is alleged against them, or gross irregularity of procedure, and your ground of challenge, namely: That they went *ultrà vires compromissi*, which would be a good one, if established, you yourself candidly admit resolves itself into an impeachment of the correctness of the opinion at which they arrived. With that we cannot interfere; were we to do so we should usurp functions that don't belong to us, and arbitrations, instead of putting an end to law suits, would only be the first step in the litigation.

Rule absolute with costs, making award a Rule of Court, and to receive due execution.

Supreme Court.

Jugement des Cours étrangères, — Exécution a Maurice de ceux rendus par une Cour Suprème de l'Inde—Société,—Preuve par témoins.

Judgments of foreign Courts,—Execution in Mauritius of those given by a Supreme Court of India,—Partnership,—Oral proof.

Number of record: 6012.

COCHRANE, Plaintiff.
versus.
LEISHMAN, Defendant.

Before:
The Honorable Sir J. E. Rémono 1st P. J. &
The Honorable N. G. Bestel 2nd P. J.

G. B. Colin,—of Counsel for Plaintiff.
A. J. Colin,—Plaintiff's Attorney.
S. J. Douglas,—of Counsel for Defendant.
J. H. Slade,—Defendant's Attorney.

13th May 1862.

(*Vide Vol. I. Pages* 170,196 *and Suprà, Page* 24.)

The two last judgments, made in this cause, in dismissing the motion for leave to adduce fresh evidence in the case, at this advanced stage of the proceedings, ordered that the cause should be proceeded with, on the merits. However, on the twenty seventh March last, when the merits were to have been gone into, the Defendant's Counsel made a third attempt at the introduction of the new evidence, which he stated to be indispensable to do justice to the merits of this case. He therefore remained silent as to the merits, but strongly insisted on the admissibility of the evidence again tendered, which was as strongly objected to, by the opposite side.

The main ground, for the admission of the evidence tendered, is fraud on the part of

Defendant's attorney, W. F. Fergusson, in the use, or rather in the abuse, made by him of the power of attorney confided to him under date of eight December 1851.

But no evidence has been given, nor has it, for a single moment, been hunted at, that the members of the "Asiatic Marine Insurance Office" were cognizant of, or had, in any way, in the slightest degree, participated in the fraud inputed to the Attorney.

In the absence of any such proofs, and saving whatever right the Defendant may have, against his agent, for having exceeded the limits of his authority, as alleged, it is clear that the contract entered into, by the Defendant's agent, with the Company, must be binding upon Leishman, unless good cause should be shewn to the contrary, before the competent Court, which has not not been done.

Moreover, this Court, not having any appellate jurisdiction over the decisions of the Supreme Court of India, necessarily abstain from going into proofs which, if satisfactory, must lead to the setting aside of the Orders of the Supreme Court of India, over which however this Court, as just observed, and for the reason first mentioned, has no control. We cannot presume that Justice has not been done to Leishman. If the evidence, raising questions upon the merits of the case, constituted a defence, this should have been pleaded in the Supreme Court of India. (See *Henderson vs Henderson.* Law J. R. 1844. Volume 22, Page 274.)

The absence of any defence, on the merits, leading to the necessary inference that the Defendant has no defence to make.

Judgment for Plaintiff with costs.

Supreme Court.

APPEL D'UN JUGEMENT DU MASTER,—VENTE PAR EXPROPRIATION,—PAIEMENT,—CERTIFICAT NÉGATIF,—C. C. ARTS. 1654, 2183.

Circonstances particulières, en vertu desquelles il a été statué qu'un acquéreur d'immeuble n'avait pas le droit d'exiger du vendeur, avant de payer son prix, la production d'un Certificat Négatif.

APPEAL FROM A JUDGMENT OF THE MASTER,—SALE BY LEVY,—PAYMENT,—CERTIFICATE OF INSCRIPTIONS,—C. C. ARTS. 1654, 2183.

Special circumstances in which the purchaser of an immoveable Estate was held not entitled to insist, before payment, that the seller should produce a Certificate from the conservator of Mortgages.

Number of Record, 8022

BOUTIN, Appellant,
Versus
OVEREND GURNEY & Co. Respondents.

Before:

His Honor the CHIEF JUDGE and
The Honorable SIR J. E. RAMSAY 1st P. J.

A. LIONNET,—of Counsel for Appellant.
C. LABORDE,—Appellant's Attorney.
Hble H. KŒNIG,—of Counsel for Respondents.
E. DUCRAY,—Respondents' Attorney.

16 May 1862.

This was an Appeal, from the following Judgment of the Master of this Court, in a matter of sale by Levy.

"Upon hearing Mr. Ducray, Attorney for the Plaintiffs, and Mr. Laborde, Attorney for the Defendant, at a sitting holden before me, on the twenty ninth ultimo, I took the matter into consideration, and now render my decision.

"By a deed of sale, drawn up by Guimbeau Notary and his fellow colleague, bearing date the twenty seventh March 1860, Overend Gurney and Co., represented as above, sell to Boutin, the Sugar Estate *La Louisa*, for the sum of $ 80,600.

"Amongst other conditions of this sale, Boutin undertook to pay off the sum of $50,000, being the amount of the sale price for which the said Estate was purchased, at the bar of this Court, by Overend Gurney & Co.

"The "Order," or Scheme of distribution, of the said sale price having been drawn up and closed, warrants for payment were delivered to the several creditors collocated.

"And Boutin, not complying with the aforesaid conditions of sale, as the payment of the said warrants, Overend Gurney and Co. had to pay them off, and, by so doing, were subrogated in the rights of several creditors, and they now proceed to make a levy, on the Estate, in virtue of the beforementioned deed of sale, by them to Boutin.

"Boutin argues that, before claiming payment from him for the same, Overend Gurney and Co. are bound to shew, by a Certificate of the Conservator of morgages, that since the original sale to Overend Gurney and Co., there exist no inscription against the latter.

"In as much as Boutin, the purchaser, has taken no steps to protect himself from being sued, in compliance with article 2183 and the following articles of the "Code Civil," the vendor, creditor on the Estate, has fully the right, in default of payment of his claim, of suing for the sale by levy, or of suing for the cancellation of the Deed of sale, without being bound to furnish to the purchaser the Certificate required.

"For these reasons, I refuse the demand of Boutin, to stay the proceedings commenced by Overend Gurney and Co. against him, and permit them to proceed to the sale of the Estate.

"With costs against Boutin."

The Court was of opinion that Boutin had here no legal grounds for refusing to pay the price, under articles 1654 of the Civil Code, as had been contended. The demand which he made, upon Overend Gurney and Co., before he should make payment was one which, in the circumstances, he had no right to make.

The Appeal was therefore dismissed, with costs.

Bail Court.

APPEAL,—ORD. No. 35 DE 1852.

Sur l'appel d'un jugement de Magistrat de District, en matière criminelle, et à moins d'injustice flagrante, la Cour respectera l'opinion que le Magistrat s'est faite sur les preuves qui ont été soumises.

APPEAL,—ORD. No. 35 OF 1852.

On an appeal from the judgment of a District Magistrate, in a criminal case, unless there has been a plain miscarriage of justice, the Supreme Court will not interfere with the opinion of the Magistrate upon the evidence adduced.

Number of Record: 143

SIBULLUCK & Ors., Appellants.
Versus.
THE QUEEN, Respondent.

Before:
His Honor the CHIEF JUDGE.

A. LALOUETTE,—of Counsel for Appellants.
V. LAVAL,—Appellants' Attorney.
S. J. DOUGLAS,—Queen's Counsel.
J. BOUCHET,—Queen's Attorney.

16 May 1862.

Boodhee, Soobeedar, Sookary, Seetal, Seebaluck, Gopaul, Seeram, Ramchurn and Dowlatees, were charged, before the Senior District Magistrate of Pamplemousses, on the prosecution of Beeharee, with larceny, in as much as, on 27th December last, during the night time, they did wilfully break the door of the said Beeharee's house, and did then and there take, steal and carry away $271.50 c, in sovereigns and divers coins, 25 silver rings, two arm—lets, two necklaces, two silver earrings, two silver nose rings, two silver wrists, one collar composed of eleven half crowns and two company's rupees, three silver chains, complainant's wife's ticket, the deed of sale of complainant's property, licence for vehicles, thirteen Indian woman's clothes, two Indian cuprás, two jackets, two waist—coats, four white turbans, one covering, two brass pots, one brass plate, one brass glass, a "bon" for sum of $80, and another for $6.

The prisoners pleaded "not guilty."

Thirteen witnesses were examined in the Court below, five for the prosecution and eight for the accused. The Judgment of the Court was as follows:

"I find the said Boodhee, Gopaul, Seeram, "Ramchurn and Dowlatees not guilty of the "said charge, and do therefore dismiss the "same as against them; and I find the said "Soobeedar, Sookary, Seetal, and Seebaluck "guilty of the offence of larceny, charged "upon them, as aforesaid, and convict them "thereof; and under Art. 310 of Ordinance "No. 6 of 1839, being the Penal Code of this "Island, I do therefore adjudge the said Soo-"beedar, Sookaree, Seetal and Seebaluck, for "their said offence, to be imprisoned, and "kept to hard labour, in Her Majesty's Jail, "at Powder Mills, in the said District, for the "space of twelve calendar months, and to pay "in solido, the sum of four pounds and one "shilling sterling, for costs, and in default of "payment of the said costs, to be imprisoned "for a further space of twenty six days, unless "the said cost be sooner paid."

The parties convicted appealed to the Supreme Court, and, under the Appeal, it has been strenuously urged, by the Counsel for the Appellants, that the learned Judge below has misapprehended the nature and weight of the evidence, and has arrived at a wrong conclusion on the proof, both as regards the *corpus delicti*, and the guilt of the prisoners who have been convicted. But, according to the fixed jurisprudence of this Court, such a reason of appeal affords no ground for alteration of the judgment below, unless there has been a plain miscarriage of justice, even were this Court of opinion (which it is not) that the District Magistrate had, on both or either of the above points, arrived at an erroneous result. (See cases of *Alfred Ayaud and Anor versus The Queen, Moedine and Anor versus Assen*, Vol. 1. pages 45 and 222 of the Decisions of the Supreme Court of Mauritius)

It has been argued, with more plausibility, that the evidence, being the same as to all persons accused, if it was not sufficient to convict the whole of them, it was not sufficient to convict any of them, and therefore that they should all have been acquitted. But this argument is founded on a misapprehension in point of fact. The Court has carefully perused the evidence, more than once, and without alluding to minor points in the depositions of the witnesses, and to the advantage the Judge below had in seeing and hearing them examined, it will be found that, of the four prisoners convicted, three were among the only four, expressly named by the complainant as seen by him committing the crime, and the remaining prisoner found guilty was deposed to as the party who held the lantern, while the theft was being committed.

The Appeal must therefore be refused with costs.

Supreme Court.

VENTE PAR EXPROPRIATION FORCÉE,—SUBROGATION,—INTERVENTION,—C. C. ART. 722,—C. DE P. C. ART. 1160.

Un créancier inscrit ne peut intervenir dans une pareille vente avant d'avoir été préalablement subrogé aux droits du créancier saisissant.

La subrogation ne peut être sommairement accordée à la barre.

Dans les cas prévus par l'Article 143 *des Rég. de la Cour, un Ordre du Master est définitif et fixe la procédure de cette cause.*

SALE OF AN IMMOVEABLE ESTATE BY LEVY,—SUBROGATION,—INTERVENTION,—C. C. ART. 722,—C. OF CIV. PROC. ART. 1160.

An inscribed creditor cannot intervene in such a sale without being subrogated to the levying creditor.

Subrogation cannot be granted summarily at the Bar.

Under Rule of Court 143, *an Order of the Master is final and fixes the procedure in the cause.*

Number of Record: 7130

J. & J. BRODIE and Ors., Appellants.

versus.

ASSIGNEES OF CESSIO BONORUM PIERRE PHILIPPE, Respondents.

LEISHMAN, Seizing party.

MERLE, Intervening party.

Before:

His Honor the CHIEF JUDGE and
The Honorable SIR J. E. RAMSAY P. J.

A. LEGALL,—of Counsel for Appellants.
J. H. ACKROYD,—Appellants' Attorney.
J. L. COLIN,—of Counsel for Assignees.
F. VICTOR,—Assignees' Attorney,
S. J. DOUGLAS,—of Counsel for Seizing [Party.
SLADE & BANKS,—Attornies for same
A. LIONNET,—of Counsel for Intervening [Party
E. LAURENT,—Attorney for same.

16 May 1862.

This case arose out of the proceedings before the Master, in the sale by levy, at the instance of James Alexander Leishman, of the Estate *Belle Source*, in the District of Flacq, belonging to Pierre Philippe.

On the 28th day of August 1860, the Master, on the hearing of parties, pronounced the following Order:

"I order that the sale do take place before "me, on Tuesday the eighteenth day of Sep- "tember next, and that the levying party do "take the necessary steps for that purpose. In "default of his so doing, I hereby order that "Ecroignard be subrogated in the proceedings, "and that in the delay of forty eight hours, "from the last mentioned date, be delivered "up to the attorney of Ecroignard, all the "necessary papers and proceedings relating "thereto.

"Cost to be considered as costs of sale."

On the first day of February 1861, the Master pronounced an order, *inter alia*, to the following effect:

"Upon hearing Mr. LABORDE, attorney for "Pierre Philippe, praying that the proceedings, "to arrive at the sale, be declared null and "void;

"Upon hearing Mr. DOUGLAS, of Counsel "for the levying parties, who declares that he "has nothing to say against the demand of "the party levied on, that he considers the "objection by the party levied on good and "valid;

"Upon hearing Mr. LEGALL, of Counsel for "Fourcand, Brodie, Paturau Dulac Escla- "pon, inscribed creditors on the Estate, pray- "ing that I maintain the proceedings by levy;

"I delay the said proceedings, and grant "Mr. LEGALL a delay of fifteen days, to make "his demand in subrogation of the said pro- "ceedings, and to call Ecroignard in the cause. "Costs reserved."

On the sixth day of April 1861 the Master pronounced the following, Judgment:

"Upon hearing Mr. SLADE, attorney for "the levying parties, praying for the sale;

"Mr. ARNAUD, of Counsel for the Assignees "of the *Cessio Bonorum*, praying that the "proceedings by levy be declared null and "void; Mr. LEGALL, of Counsel for Fourcand "Brodie, Paturau Dulac and Esclapon, credi- "tors on the said Estate, praying that the sale "do take place this day;

"I give default against Pierre Philippe and "Lecourt de Billot not appearing;

"And whereas, by my Order of first day of "February last, I granted permission to Four- "cand, Brodie and others, creditors on the "*Belle Source* Estate, to enter before me, "within the delay of fifteen days, if they deem "fit, their demand in subrogation of the pro- "ceedings by levy, and to call in the cause "Ecroignard; and I delayed the question of "nullity of the said proceedings raised by the "party levied on;

"Whereas no such steps, in pursuance of "my said Order of first day of February last, "by the said creditors have been taken, where- "by the question, as to the nullity of the said "proceedings, still remains open and undecid- "ed;

"Whereas by the CHIEF JUDGE's Order, of "this day's date, he has authorized JULIUS "HERCHENRODER, the Official Assignee, and "JULES GAUTIER and VOLCY DUMONT, Credi- "tors' Assignees of the *Cessio Bonorum* of "Pierre Philippe, to carry on, before me, the "proceedings entered by the said Pierre Phi- "lippe, before me, in order that the seizure "and proceedings by levy of the said Estate "be declared null and void.

"I postpone the sale of the property to a "futu[illegible] day;

"Whereupon Mr. LEGALL, of Counsel for "Brodie and others, asks to be subrogated at "the Bar, in the said proceedings by levy; I "record his application."

On twenty second day of July thereafter, at a meeting before the Master, the Assignees of Pierre Phillippe (who had sued out a *Cessio Bonorum*) pressing that the proceedings be declared null and void, and the levying party having nothing to say against this motion, the Master declared the proceedings, to arrive at the sale of the *Belle Source* Estate, null and void, and the levying party and Brodie and others were condemned to pay their own costs; the costs incurred by the Assignees to be paid by the levying party.

Brodie and others appealed to the Supreme Court.

JULES L. COLIN, for the Assignees in the *Cessio Bonorum* of Pierre Philippe:

Though a Respondent here, I crave leave to open the discussion, as I shall, by and bye, shew that the appeal is quite incompetent. (Recites the proceedings before Master.) The appearance of these inscribed creditors, Brodie, and others, raises the important question whether persons, in that position, already creditors, have a right to intervene separately, and argue the nullity of the proceedings.

The Master has given effect to the constant jurisprudence of France, which has hitherto been always followed in this Colony, and has rejected the interference. The Master has, most justly, held that they had no *locus standi* in the cause, as they had not been subrogated to the seizing creditor.

The Master's Judgment was perfectly right. To hold the contrary would be quite opposed to the whole scope of the proceedings for sale of real estates. The law itself declares that they are to go on in a summary manner, and if every inscribed creditor were to be allowed to take a part in the proceedings, they would be protracted to a ruinous extent, both as regards time and expence. After the levying credito, has notified his seizure to the other creditorsr he truly represents them all, as their *mandataire légal*. If he does not do his duty, the remedy is open under Art. 722 of the C. of Civ. Proc.:

"La subrogation pourra être également "demandée s'il y a collusion, fraude ou négli- "gence; sous la réserve, en cas de collusion ou "fraude, des dommages intérêts envers qui il "appartiendra. Il y a négligence, lorsque le "poursuivant n'a pas rempli une formalité, ou "n'a pas fait un acte de procédure, dans les "délais prescrits."

But in truth, the Appellants are out of Court, upon the singular procedure in which they have chosen to indulge; they never appealed against the Master's Order allowing them fifteen days to proceed by subrogation. It is directly in face of Sect. 143 of the Rules of Court, and is fatal to the Appeal.

This Rule of Court runs thus:

"In all cases, in which the Master may "have made an order, except in cases referred "to him for a Report, a party, dissatisfied there- "with, may, within the delay of three days, "from the date of the said order, appeal there "from, and in such case, such party shall bring "the matter, before the Court, by motion, within "four days from the date of such Order, if in "term time, and if in vacation, within the "first four days of the next ensuing term, and "the Court shall summarily deal with and "dispose of the matter.

"Such Appeal shall be made in writing, and "shall distinctly set out the grounds of such "appeal, and no other grounds than those so "specified shall be brought forward when the "Appeal is heard. If, pending such appeal, "and on account thereof, it should become "necessary to delay the sale of the property "levied on, or any part thereof, and the Ap- "peal be subsequently dismissed, the Appel- "lant shall pay all the costs caused by such "delay of sale."

DOUGLAS, *for levying creditor.*

I maintain the same grounds, generally, as the preceding Counsel. According to the law of Mauritius, no inscribed creditor has any right to intervene, except by subrogation to the levying creditor. The new French rules of one thousand eight hundred and forty one (1841) have never been introduced into this Colony, and we must take the law as it stood anterior to that period. The authority of the no doubt elementary, but standard work, of ROGRON, is conclusive. (Nete on art. 722 C. Civ. Proc.) No laches, or collusion was alleged against the seizing creditor. The Appellants went on a wrong line of proceeding altoge- ther.

By the Master's Judgment of first day of February 1861, they were allowed fifteen days to make their demand in Subrogation. On sixteenth day of April 1861, when the question of the nullity of the whole proceedings was not disposed of, what possible right could the inscribed creditors have to ask, as they did, that the sale should go on. (See PIGEOT (1835) 2nd Vol, P. 172.) That is precisely the case, for we have the " adjudication préparatoire" under a different name.

The inscribed creditors never revived their motion. It is quite discretionary whether subrogation should he granted or not. (BIOCHE (1852) *Saisie Immobilière*, Vol. 635.)

We have nothing to do with the New French law of 1841. So far as I can discover there is only one old authority, the least favoring the Appellant's views; that is a case in the *Cour de Cassation*, 26 Décembre 1820, but there the party, at the same time, asked for subrogation. (See far, ther the cases in the *Cour de Cassation* dated 22nd February 1829 note, 11th May 1826.—19 July 1842. Note to SIREY by DE VILLENEUVE, 11th May 1826.)

LEGALL, for Appellants, inscribed creditors.

There are only two bare questions of law here; (1) Whether inscribed creditors have any freedom of action, or whether they must just walk in the leading strings of the seizing creditor, however opposed his interests may be to theirs. (2) Was I entitled to subrogation, or was I not, and has the Master disposed of my motion.

On the first question, I do not require to resort to new authorities, since 1841, I refer to MERLIN. 1826. V. 16, P. 332. Question 1260 and SIREY 2. 1.36.

By Art. 1166 C. C. I can exercise all the rights of my debtors; my interests, so far from being identical with those of levying creditor, are opposed to his; he has got payment of his debt or has settled with the debtor Philippe. Any rule of the Code of Civil procedure must yield to the above positive enactment of the Civil Code itself. Then look at the actual course of procedure before the Master. (Reads Orders.) By the Order of firstday of February, fifteen days were no doubt granted me, to get a subrogation. I never asked any thing of the kind; at best it conferred in me a mere faculty, which I declined to exercise. I did not appeal. There was no judgment against me, or even a proper order upon me. Then the debtor, his assignee, and the levying creditor concert together, that the sale shall not go on. On sixteenth day of April, I expected the sale would go on and was in attendance, with a cheque ready in my pocket; but the Master delayed the sale and I was never heard on the offer I then made, to be subrogated. It is said I have no *locus standi*, but they are too late with that Plea I have actually been present, and intervened at every stage without objection.

See MERLIN, *Répertoire*, " Intervention." 6th No. of 1st paragraph.

COLIN *replies*. The facts are not exhibited, on the other side, in their true colors. For a long time, after the commencement of the proceedings by levy, the Appellant never appeared; at least, when they did so, their intervention was sustained by the Master, only if, within fifteen days they proceeded by subrogation. They failed to do so and they were never recognised subsequently, but really repulsed by all parties. Their last singular claim, to be subrogated, is altogether untenable in any views, whether looking at the facts or law of the case. (See CHAUVEAU (1843) 2. 5. N. 685.

CARRÉ. Nos. 24. 39.

BIOCHE. No. 35. *Saisie immobilière.*

DOUGLAS *replies*. The motion of sixteenth April 1861, to be subrogated at the bar, was plainty quite inadmissible. Subrogation is at the discretion of the Judge, and must proceed on some fault or neglect of the levying creditor. It can never be granted, in a mere summary way, at the bar. SIREY 1839—31st December.

In fact the Appellants were here never serious in their demand. They lay by, and did nothing.

LIONNET, for *Merle* an inscribed creditor; argued his right, as such, to intervene in the sale, relying on the case 20th December 1816. *Journal du Palais*. & another case. Ibidem 26th December 1820. DALLOZ " Intervention " 14 and 15. SIREY 1820. 11 May. Mauritius, Supreme Court, 1845, BRUZEAU'S Reports, Page 135.

JUDGMENT.

Some very important and interesting questions have been urged, in this case, with a copious citation of authorities.

But, in the view which the Court finds itself compelled to take, in the very special circumstances occurring in the course of the procedure here, it is necessary to enter on a consideration of these larger discussions.

By Article 143 of the General Rules of Court, it is enacted as follows: (quoted above.)

By his Order of first February 1861, the Master, in the exercise of the ample jurisdiction which the law confers upon him, in matters of sale by levy, granted the Appellants a delay of fifteen days, to make their demand in subrogation of the proceedings. Now, that

Order, in point of law, was either right or wrong. If right, there is, of course, an end of the matter; if wrong, it ought to have been appealed against. But, in any view, whether right or wrong, it is now the law of the case, and binding upon the parties litigating, not having been brought under review. There it stands unrecalled and long since final. The Court has no power to grant the Appellants the indulgence they now crave, in the position which they themselves have allowed the case to assume, the summary mode of procedure, suggested by Brodie and others, at the meeting of sixteenth April 1861, was altogether incompetent The Appeal is therefore dismissed with costs.

Supreme. Court.

NOTAIRE,—ETAT DE FRAIS,—CESSION TRANSPORT,—C.C. ARTS. 1282, 1692, 2112,—ORD. No. 19 DE 1856.

Lorsqu'un notaire cède et transporte un état de frais, qui lui est dû, et qui a été approuvé et taxé, le cessionnaire peut en poursuivre le recouvrement, par les mêmes voies légales que celles que peut employer le notaire, en vertu de l'Ordonnance No. 19 *de* 1856.

NOTARY,—ASSIGNMENT,—C. C. ARTS. 1282 1692, 2112.—ORD. No.19 OF 1856.

When a notary assigns an account, due to him, which has been duly audited and taxed, the assignee has the same remedies for recovering payment, under Ord. No. 19 *of* 1856, *as the notary himself.*

Number of Record: 8315

MARIETTE, Plaintiff.
versus
SÉNÈQUE, Defendant.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2nd P. J.

G. B. COLIN,—of Counsel for Plaintiff.
P. ROBERT,—Plaintiff's Attorney.
V. NAZ,—of Counsel for Defendant.
A. J. COLIN,—Defendant's Attorney,

14*th May* 1862.

In this case, a Summons was issued against Senèque, to shew cause why a Writ of execution should not at once issue, under Ordinance. No. 19 of 1856, for payment of the amount of a Bill of cost, to Mr. Notary Pelte, duly audited and taxed, at £ 42. 3. 3, and assigned to Mariette.

Section IX of the said Ordinance is in these terms:

"Notaries may obtain, by way of application "to a Judge, at Chambers, a Writ of Execu"tion, to enforce payment of their Fees and "Disbursements, on their bills being, as above, "by the Master previously taxed."

Mr. NAZ shewed cause:

The right conferred upon Notaries, by the Ordinance, is a mere personal privilege, it cannot be assigned; Mariette is no party to the business, he is a mere stranger. He may, perhaps, in law, take such an assigment as this, but if so, he must sue us in the inferior Court, in the ordinary way. We were no parties to the taxation which was *ex parte*. The items of the charges in the account do not distinctly disclose the nature of the business done; we have had no opportunity of checking this account; besides, I hold in my hand an Exemplification of the Notarial acts, which, by Art. 1282 of the Civil Code, is a presumption that the Notary has been paid. SIREY 1852. 1. 311, 1836. 2. 55.

G. B. COLIN. for Mariette,

The interesting questions raised on the other side are not in the case. Every legal right is assignable, and our modern law, for recovery of such debts, as the present, has wisely established a remedy, by going before a Judge at Chambers, for more simple, expeditious and economical means, than by resorting to any Court. Mariette was, in point of fact, not a stranger, having been interested in part of the proceedings. The whole regulations of Ordinance were strictly adhered to by the notary, and if Senèque and wife did not appear at Chambers, they had themselves to blame. As to the last point, Article 1382 of Civil Code, which speaks of the *titre original*, has no application to the present case, where there is a mere *exemplification* only, and even the following Article, by which the handing over of a copy ready for execution, (*grosse*) establishes a mere presumption of acquittance, has no bearing here.

The COURT delivered judgment:

As a general rule, every right, *in commercio*, is capable of being assigned to a third party; and according to the aim and liberal genius of the Civil Code, the accessories are usually held to go with the principal. Thus, by Art. 1692, it is said: *La vente ou cession d'une créance comprend les accessoires de la créance, tels que caution, privilège et hypothèque*, and by Article 2112, the assignees of all debts, to which certain very important special rights or privileges are given by law, are declared to stand in the shoes of the assignors, and to enjoy all their rights, *les cessionaires de ces diverses créances privilégiées exercent tous les mêmes droits que les cédants en leur lieu et place.*

The other objections have, we think, been satisfactorily met by Mariette. It is only the handing over of the original private deed that, in terms of Article 1282, amounts to proof of

a discharge: "La remise volontaire du titre "original, sous signatures privées, par le cré- "ancier au débiteur, fait preuve de la libéra- "tion." The handing over of a formal *grosse*, in terms of the next article, only establishes a presumption of abandonment or payment of the debt: "La remise volontaire de la grosse "du titre fait présumer la remise de la dette, "ou le paiement, sans préjudice de la preuve "contraire." This Article cannot apply here, where there is only an *exemplification*, and where payment is not even alleged.

We are, therefore, of opinion that Mariette legally stands in the shoes of Pelte, and that the Writ of execution prayed for must issue, for the amount aforesaid, with costs.

Bail Court.

VERIFICATION D'ÉCRITURES,—PREUVE TESTIMONIALE, ARTS 193 & S. S. C. DE P. C., —ARTS 137 DES RÉGLEMENTS DE LA COUR.

Un défendeur, poursuivi pour le paiement d'un compte, ayant produit, en déduction de ce compte, quelques reçus portant la signature du demandeur, et celui ci ayant nié sa signature, la Cour a permis au Défendeur de prouver, par témoins, la validité de ses reçus; mais n'étant pas satisfaite de cette preuve, les reçus ont été rejetés par la Cour.

DENIAL OF HAND WRITING AND SIGNATURE, —ORAL PROOF,—ARTS 193 & S. S. C. OF P. C.,—ARTS 137 OF THE RULES OF COURT.

Where a Defendant, sued for payment of an account, produced certain receipts which he alleged were granted by the Plaintiff for sums paid to account, and the Plaintiff denied that he ever wrote the receipts, the Court, under Rule No. 137, allowed the Plaintiff to support the alleged receipts by parole evidence, but ultimately rejected them as spurious.

Number of Record: 3382

HAJEE HOSMAN CADOO, Plaintiff.
Versus.
GUNGARAM, Defendant.

Before:
His Honor the CHIEF JUDGE.

J. L. COLIN,—of Counsel for Plaintiff,
J. PIGNÉGUY,—Plaintiff's Attorney.
A. LALOUETTE,—of Counsel for Defendant
C. LABORDE,—Defendant's Attorney.
7th May 1862.

In this case, the Plaintiff asked payment of the sum of $306,89, as the balance due, by Defendant, on account of goods sold and delivered. "Bons" were produced for the whole amount, but the Defendant produced five receipts or discharges, in the Arabic character, for sums alleged to have been paid to account, reducing, as he contended, the real amount due to $68. The Plaintiff admitted three of the receipts, but denied that the other two were genuine, and gave notice to that effect to the Defendant, under Article 137 of the Rules of Court, which is in these terms:

"When any notice of intention to adduce any "written document, at the trial of an action, "shall have been given to any party to such ac- "tion, in manner prescribed in Rule 23, such par- "ty must take some step, previously to such trial, "to dispute the genuineness of any signature, "such document may bear, or to declare that "he is unable to say whether such signature "(if it purport to be that of another person) "be genuine or not; otherwise such signature "shall (unless the Court or a Judge in any "particular case make order to the contrary) "be taken *primâ facie* at such trial, to be that "of the person by whom the document pur- "ports, on its face, to have been signed."

At the trial the Court allowed the Plaintiff, if he should be so advised, to adduce evidence, in support of the genuineness of the two disputed receipts.

Three witnesses were examined by him.

The first deposed that he saw the Defendant before the last *bonne année*, hand over money to the Plaintiff, on three different occasions, and receive a piece of paper, from the Plaintiff on each occasion.

The second stated that he saw the Defendant pay over money to the Plaintiff, on two occasions, after the last *bonne année*, and receive in return a piece of paper.

The third witness had dealings with Defendant, and knew his signature. He deposed that the three receipts, admitted by the Plaintiff, were, in his opinion, subcribed by the Plaintiff, in regard to one of the two others which the Plaintiff denied.

The witness deposed: "The handwriting is not the same as in the ones admitted to be genuine." And in regard to the other, the witness said: "I can't say if this is in the handwriting of Plaintiff or not." The Plaintiff laid no evidence on the point.

JUDGMENT.

The Court has carefully examined the different documents produced, and looking at the appearance of those writings, and the evidence adduced, it regrets to be obliged to arrive at the conclusion, that the two disputed receipts cannot be relied on as genuine, and proceedings in another Court, may be necessary.

Judgment must therefore go for the full amount claimed, with costs.

Caption of the body limited to three years.

Supreme Court.

APPEL AU CONSEIL PRIVÉ,—DEMANDE EN RÉPARATIONS DES BATIMENS PLACÉS SUR LES TERRAINS LOUÉS, — DÉFAUT D'ÉVALUATION DANS LA DEMANDE,—DÉFAUT DE COMPÉTENCE.

APPEAL TO THE PRIVY COUNCIL,—CLAIM OF REPAIRS TO THE BUILDINGS STANDING ON A LEASED GROUND,—WANT OF VALUATION OF AMOUNT CLAIMED,—WANT OF JURISDICTION.

Number of Record, 6554.

CANTIN, Appellant.
Versus.
LOUSIER & Ors., Respondents.

Before:
The Hble. SIR J. E. RÉMOND, 1st P. J. and
The Honorable N. G. BESTEL, 2nd P. J.

J. L. COLIN,—of Counsel for Appellant.
E. DUVIVIER,—Appellant's Attorney.
G. B. COLIN,—of Counsel for Respondent.
J. GUIBERT,—Respondent's Attorney.

13th *May* 1862.

(*See Vol.* 1 *Page* 192.)

This was a motion, on the part of Cantin, for leave to apppeal to Her Majesty in Council, from a Judgment of this Court, dated the 21*st November* 1861, made upon the demand of Cantin, the then Plaintiff, against Lousier and other, the then Defendants, and owners of the Estate *Ferney* for sundry repairs, alleged by Cantin to be required, by the buildings of the said Estate *Ferney*, and for the replacing of sundry bullocks and mules, also required, for the full enjoyment of the said Estate as lessee thereof.

On the above action the Court considered that the then Plaintiff, now Appellant, had no right to claim the repairs set forth in his Declaration, and dismissed the action with costs.

The question, now before the Court, is the admissibility of the Appeal to Her Majesty now prayed for.

Parties heard, the Court took time to consider, and now proceeds to deliver its judgment:

Next to the finality of the judgment, the Order in Council requires that " the sum or matter at issue " should be above the amount or value of £ 1000.

Does the sum or matter at issue, in this cause, exceeds that amount ?

On reference to the Declaration, we find a prayer for putting all the buildings, existing on the said Estate *Ferney*, in proper and tenantable repairs, and specially to make the various repairs and works enumerated in the memorandum to the Declaration annexed, and to replace certain animals therein mentioned.

That in case the said works and repairs be not made, and the said bullocks and mules replaced, within a reasonable time, to be fixed by the Court, that the said works be made and the animals replaced, at the costs of the Defendant, and the Plaintiff authorized to cause the sugars, or such portion thereof, as may be necessary to be sold, in order to apply the produce thereof to the payment of the works.

In no part of this Declaration is the amount of repairs or the value of the animals setforth; whether, in the aggregate or severally, the sum required for the above purposes be or be not above the amount or value of £ 1000, it is impossible to say. This should have been clearly set out. (See *Berger versus Bordas*. PISTON'S Reports. Vol.1 Pages 125.)

Leave to appeal must therefore be refused, with Costs.

Supreme Court.

APPEL AU CONSEIL PRIVÉ,—RÉSOLUTION DE BAIL,—EXÉCUTION PROVISOIRE,—CAUTION.

APPEAL TO THE PRIVY COUNCIL,—CANCELLATION OF LEASE,—PROVISIONAL EXECUTION,—SECURITY.

Number of Record, 6564.

CANTIN, Appellant.
Versus.
LOUSIER & Ors., Respondents

Before:
The Honorable SIR J. E. RÉMOND 1 P. J. and
The Honorable N. G. BESTEL 2d. P. J.

J. L, COLIN,—of Counsel for Appellant.
E. DUVIVIER,—Appellant's Attorney.
G: B. COLIN,—of Counsel for Respondents.
J. GUIBERT,—Respondents' Attorney.

13 May 1862.

(*See Vol.* 1 *Page* 197.)

On the 29th November last, this Court gave, in a suit pending between the same parties, a Judgment in favor of the Plaintiff, now Respondents, ordering, for the reasons therein set forth, the cancellation of the lease, the subject matter of the action then pending before the Court, staying execution however, of such judment, as to such cancellation, for 10 days within which time the then Defendant and now Appellant Cantin, was to pay the amount of the damages awarded against him, failing which, the judgment, as to such cancellation was to be carried into execution.

The then Defendant Cantin now moves for leave to appeal from the above judgment.

The admissibility of this Appeal was not disputed, by Lousier and Ors., who, in their turn, moved that it "be directed, by the Court, that the Judgment appealed from, shall be carried into execution, on the said Lousier & Ors. in whose favor the above Judgment has been given, entering into good and sufficient security, to be approved by the Court, for the due performance of such Judgment or order as Her Majesty, &a. &a. shall think fit to make thereupon.

After hearing parties, the Court took time to consider, and now proceeds to deliver its Judgment:

The Court is of opinion that the Judgment, from which leave to appeal is now prayed for, ordering the cancellation of the lease, is final and conclusive to all intents and purposes, as far as such cancellation is concerned; that the stay of execution, ordered during 10 days, was allowed with the sole view of affording the Defendant the necessary time for payment of the rent due, the absence of which had led to the cancellation of his lease.

It is clear that the Plaintiffs, now Respondents, ought not and are not to be kept out, at the same time, of their Estate and of the rent due to them, whether in kind or in specie.

The consequence is that, if the rent due be not immediately paid, by reason of the allowance of the Appeal to Her Majesty, immediate and provisional execution of the Judgment ordering the cancellation of the lease, must be granted, so as to put the Plaintiffs, now Respondents, into the immediate possession of the property leased but by them, on their entering into good and sufficient security, as prayed for, in the sum of $ 9800.

Leave is therefore granted to the then Defendant, and now Appellant Cantin, to appeal to Her Majesty, and immediate and provisional execution of such Judgment of cancellation of the lease is, at the same time, allowed, on Lousier giving security in the sum of 9,800 dollars, with the interest which may be due thereon, for the due performance of such Judgment or Order, as Her Majesty, in Her Privy Council, shall think fit to make, on the Judgment appealed from.

Each party to pay its costs.

Supreme Court.

SAISIE ARRÊT,—OPPOSITION,—FORME DE LA SAISIE ARRÊT,—OBJETS ATTEINTS PAR LA SAISIE-ARRÊT.

ATTACHMENT OF MONIES AND GOODS,—FORM THEREOF.—GOODS AND MONIES ATTACHED THEREBY.

Number of Record, 7880.

CANTIN and ORS, Plaintiffs.
Versus,
LOUSIER & Ors., Defendants.

Before:
The Honorable SIR J. E. RÉMOND 1 P. J. and
The Honorable N. G. BESTEL 2d. P. J.

J. L. COLIN,—of Counsel for Plaintiffs.
E. DUVIVIER,—Plaintiff's Attorney.
G. B. COLIN,—of Counsel for Defendants.
J. GUIBERT,—Defendant's Attorney.

13 May 1862.

The object of this action was to determine the validity of a joint attachment, lodged by the Plaintiffs, in the hands of one Jean Cantin, the lessee of the Estate *Ferney*, now the sole property of the Defendants, by purchase, on a sale by licitation between the former joint owners of the Estate, the Plaintiffs and the Heirs Vitri, for the purpose of securing payment of their respective shares in the purchase price due by the Heirs Vitri of the above Estate.

The share occuring to Plaintiffs, in such purchase money, is fixed, by the deed of partition, drawn by Mr Notary Pelte, to the principal sum of $39,000.

On this claim, the Plaintiffs have been paid, from the deposit of $ 14,000 in the hands of the Master, the sum of $9,750, and are therefore still creditors of the purchasers, (the Defendants) in the sum of $29,250, for securing payment of which principal sum, with interest, the attachment above mentioned has been lodged.

The date of this attachment is not immaterial, in considering its validity, as to, and its effects on, the second year's rent, for the non-payment of which to the Plaintiffs, his land lords, the lessee and garnishee, Jean Cantin, has set up this attachment.

That date is of the 16th October 1861, and the property attached is: "All sums of money "and other property whatsoever which you, "the garnishee and lessee Jean Cantin) *now* "owe or may owe, have or may have, on whatever account, to the within named Defendants."

The sums or other property, affected by that attachment, can be such sums or other property only which might be due by, or in the hands of the garnishee Jean Cantin, on the 10th October 1861. The rent of the year 1860 to 1861 might be affected thereby, but certainly

not the rent of 1861 to 1862, which was not then in *esse*, and more especially in the absence of any expression clearly intimating, or necessarily implying the intention, on the part of Plaintiffs, of attaching all subsequent and future rent or other property.

The right of the Plaintiffs, to the payment of their share, in the purchase money, is undeniable, the amount of their claim has not been disputed, and their attachment in form being strictly conformable to law.

The Judgment of the Court is that the attachment be and is validated as to such sums or other property only as were due by, or in the hands of, the lessee and garnishee Jean Cantin, at the date of the 10th October 1861.

Each party to pay its own costs.

Supreme Court.

APPEL D'UN JUGEMENT DU MASTER,—CERTIFICAT DE FOLLE ENCHÈRE ENTRE CO-LICITANTS,—CLAUSES DU CAHIER DES CHARGES.

APPEAL FROM A JUDGMENT OF THE MASTER.—CERTIFICATE OF "FOLLE ENCHÈRE" BETWEEN CO-OWNERS,—CONDITIONS OF THE MEMORANDUM OF CHARGES.

(*Number of Record*: 25.

LOUSIER & WIFE, Appellants.
Versus.
CANTIN & ANOR,, Respondents.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2nd P. J.

E. LECLÉZIO,—of Counsel for Appellants.
C. LABORDE,—Appellant's Attorney.
J. L. COLIN,—of Counsel for Respondents.
E. DUVIVIER,—Respondents, Attorney.

13*th May* 1862.

This was an Appeal, from a Decision of the Master, of the 29th October 1861, setting aside an opposition by the now Appellants, to the delivery of the Certificate of the non fulfilment, by them, of the conditions of their purchase of the Estate *Ferney*, upon the sale by licitation, between parties, of the 27th September 1860.— (Article 737. Civil Code,)

Two grounds of Appeal were originally urged against that decision; 1o. Want of jurisdiction, in the Master, to order the delivery of the Certificate prayed; for 2o. Because partners, as regards real Estates are, *enter se*, on the same footing as co heirs, who cannot sue out "Folle Enchère," against the co-heir purchaser of the joint Estate, for the payment of the purchase price.

The first ground of Appeal, having been abandonned by the Appellants, the Court will confine its attention to the examination of the worth of the 2d ground.

On maturely considering the arguments urged, on both sides, the Court has arrived at this conclusion, namely: That whether doubt might have existed, in the absence of an express condition, that the non fulfilment of the conditions of the sale, whether between co-owners, or co-heirs of an Estate, would be visited with the penalty of the "Folle Enchère," such doubt is not permissible in presence, as in this case, of an express stipulation of which the Appellants had notice, previous to as well as at the sale.

Had such a condition appeared to the co proprietor to be too onerous, he might and should have absteined from purchasing. But warned as he was, he cannot and ought not to be allowed to depart from the judicial contract entered into, between himself and his co-owners, or other creditors of the Estate.

The Appeal is therefore dismissed, and the the Master's decision is affirmed, with Costs.

Supreme Court.

OPPOSITION A LA DÉLIVRANCE DES LOYERS,—DOMMAGES ET INTÉRÊTS.

ATTACHMENT OF RENTS.—DAMAGES.

Number of Record, 7894.

LOUSIER & ORS, Plaintiffs.
versus
CANTIN, Defendant.

Before:
The Honorable SIR J. E. RÉMONO, 1 P. J, and
The Honorable N. G. BESTEL, 2nd P. J.

G. B. COLIN—of Counsel for Plaintiffs.
J. GUIBERT,—Plaintiffs' Attorney.
J. L. COLIN,—of Counsel for Defendant.
E. DUVIVIER,—Defendant's Attorney.

13*th May* 1862.

The aim of this action in damages was to obtain, from the Defendant, payment in the shape of damages, of the sum of $9.800, with interests at 9 per cent per annum, from the 8th January now last past, with arrest in execution and costs, under all reservation, especially of taking advantage, in due course of law, of Judgment of the 29th November 1861, between the same parties. (Vol. 1 Page 197.)

The only defence set up was the existence, in the hands of the Defendant, of a certain

attachment laid, against the delivery to Plaintiffs, of the sugars due to them by Defendant, for rent of the Estate enjoyed by the latter.

This defence is untenable in law. Assuming for the present, the existence and validity of such an attachment, had the Defendant been really anxious to discharge his debt to the owner of the Estate, it was his bounden duty to deposit the amount of his rent, whether in kind or in specie, with notice to his landlord and to the attaching parties, of such deposit.

It is therefore ordered that the Defendant do, within 48 hours, from the date of this Judgment, deposit the sum of $9.800, being the amount awarded for rent, in the shape of damages, with interest at 9 per cent per annum, from the 8th January now last past; notice of such deposit to be given to the parties interested.

Arrest in execution, limited to three years, and costs against Defendant.

Bail Court.

VENTE DE MARCHANDISES,—DEMANDE EN LIVRAISON OU EN DOMMAGES & INTÉRETS,—PREUVE DE LA VENTE,—TÉMOIGNAGE DU COURTHER.

SALE OF GOODS,—CLAIM FOR DELIVERY THEREOF, OR FOR DAMAGES,—PROOF OF SALE,—ORAL EVIDENCE OF SWORN BROKER.

Number of Record. 3280.

SULYMAN, Plaintiff.
Versus.
MAMODE, Defendant.

Before:
The Honorable N. G. BESTEL 2d P. J.

E. PELLEREAU,—of Counsel for Plaintiff.
F. VICTOR,—Plaintiff's Attorney.
C. M. CAMPBELL,—of Counsel for Defendant.
H. PASTOR,—Defendant's Attorney.

7. *May* 1862.

The subject matter of this suit is an action for the delivery, by the Defendant, of 740 China mats, by him sold to Plaintiff, thro' the medium of Ligeac, a Sworn Broker, at the rate of $ 35 per 0|0 of China mats, with 7 0|0 discount, to be paid cash after delivery thereof; and in default in $ 100 damages for such breach of contract, with arrest in execution and costs.

The evidence of the Broker, in this cause, clearly shews: 1o. That the China mats, which he had been instructed to dispose of, had not yet been landed, at the date of such instructions; 2dly, that the Defendant pointed out, to the broker, as a sample of the mats to be sold the one on which he was seated, when instructing the Broker, namely: a mat of small size, the market price of which was $ 35 the 0|0, and was well known to the Plaintiff. 3dly, that the mats sold to the latter by the broker were small sized mats. 4thly, That the mats landed, after contract, turned out to be large ones and of a higher value, which circumstances led to the breach of contract and damages, complained of.

No evidence having been given to rebut the statement of the broker, that the mats sold to Plaintiff were of small size, that the Plaintiff knew the market price for such small mats to be $ 35, I am bound to hold that neither the breach of contract nor the Damages complained have been proved.

Action therefore dismissed with costs.

Bail Court.

LA PRÉSOMPTION LÉGALE EST QUE LES ÉPOUX SONT MARIÉS SOUS LE RÉGIME DE LA COMMUNAUTÉ,—CELUI QUI ALLÈGUE LE CONTRAIRE DOIT EN FOURNIR LA PREUVE,—LE MARI A SEUL DROIT D'ADMINISTRER LA COMMUNAUTÉ. C. C. ART. 1421.

THE PRESUMPTION OF LAW IS THAT SPOUSES ARE MARRIED IN COMMUNITY OF GOODS,—AND IF THE CONTRARY IS ALLEGED IT MUST BE PROVED,—THE HUSHBAND HAS THE SOLE RIGHT OF ADMINISTRATION C. C. ART. 1421.

Number of Record: 288

CONNOR, Appellant.
versus
BESTEL, Respondent.

Before:
His Honor the CHIEF JUDGE.

E. BAZIRE,—of Counsel for Appellant.
T. HETCHENRODER,—Appellant's Attorney.
J. L. COLIN,—of Counsel for Respondent.
SLADE & BANKS,—Respondent's Attorney.

13*th June* 1862.

In this case the Plaintiff concluded against the Defendant for payment of the sum of $200, for five months rent, from seventeenth October last past, to 17th March of the present year, of a house and premises, situate in Madame street, Port Louis, No. 46, by Plaintiff let to Defendant, at the rent of $40 per month. Plaintiff prayed Judgment ordering Defendants to quit and leave forthwith the above premises, and this in obedience to a

certain notice, served upon him, at request of the Plaintiff, by usher Ringuet, on fifteenth February, with costs.

In the Court below, we find, from the Record, that the following procedure took place :

CAMPBELL (Counsel for Defendant, now Appellant.) said :

"The Plaintiff never let the house for "which the claim is now made. Still in same "house. Belongs to Madame Bestel ; has "been there for twelve months.

"SLADE (Counsel for Plaintiff, now Res- "pondent,) said that the House was in the "name of Bestel, and farther that he had paid "rent. The payment of rent acknowledges "the Plaintiff's title, since tenant is stopped "from disputing landlord's title. Also where "the landlord, who actually lets the premises "brings the action, proof of tenancy is suffi- "cient evidence of title against the tenant. "Defendant admits the occupancy.

"CAMPBELL said a mere allegation. Has "paid rent but cannot produce receipts not "being here.

CAMPLELL again said that Bestel was to "prove that he was landlord.

"But the Court decided that having paid "rent, and refusing to produce receipts to "show not paid to Plaintiff, established the "fact of landlord and tenant."

Accordingly Judgment went for Plaintiff, with costs, and the Defendant was ordered to quit forthwith.

Defendant appealed :

BAZIRE, in support of Appeal : This is a short and simple case. There was no proof of the relation of landlord and tenant ; no proof either of written or verbal lease, and of course no proof that any rent was due. The learned Judge below had no materials for his Judgment ; the house is not the Plaintiff's but belongs to his wife, Madame Bestel.

J. L. COLIN, for Plaintiff, now Respondent :

The real defence here is : I may be due the rent claimed to Madame Bestel, the owner of the house, but not to her husband. This admission is quite enough. Between married persons, the presumption always is in favor of their being married *en communauté*, and if so by Article C. C. 1421, the Plaintiff is entitled to insist : "Le mari administre seul les biens "de la communauté."

HIS HONOR THE CHIEF JUDGE : It appears to me that the record below, shews, with reasonable distinctness, that the Defendant, (now Appellant) admitted that he was in possession of the house, the rent of which is in question, and had been so for twelve months. It will be observed that, in this case, he is sued for five months' rent only, and as he has been much longer in possession, the assertion that he has already paid rent, is much strengthened, and his declinature to produce the receipts naturally weighs much against him. Every presumption of law, is in favor of the Plaintiff's right, as husband, to recover the rents of an immoveable subject, in which the spouses are interested as proprietors, and under lease to a tenant. If the Defendant intended seriously to dispute the husband's right to recover, the *onus* lay on him, (the Defendant) to establish a special case. This he has altogether failed to do.

The Appeal must therefore be dismissed, with costs.

Supreme Court.

VENTE DE MARCHANDISES,—QUALITÉ DE LA MARCHANDISE AU MOMENT DE LA LIVRAISON,—PREUVE DE CETTE QUALITÉ,—ONUS PROBANDI,—REFUS DE PRENDRE LIVRAISON.

SALE OF GOODS.—QUALITY OF GOODS ON THE DAY OF DELIVERY,—PROOF OF SUCH QUALITY,—ONUS PROBANDI,—REFUSAL TO TAKE DELIVERY.

Number of Record : 7740.

OMAR JACOB, Plaintiff.
versus.
IRELAND, FRASER & Co., Defendants

Before :
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2nd. P. J.

J. L. COLIN,—of Counsel for Plaintiff.
F. ROBERT,—Plaintiff's Attorney.
G. B. COLIN,—of Counsel for Defendants.
A. J. COLIN,—Defendants' Attorney.

30th May 1862.

The Declaration, in this case, set forth a purchase, under date the fourth day of November last, by Defendants, through the medium of one Ligeac, a Sworn Broker, of 500 bags of dates, at the rate of $3, 72. The Defendants took delivery of 241 bags, but refused to take delivery of the remaining 259 bags, though summoned by Plaintiff to do so.

The Declaration concluded with the prayer that the Defendants be condemned forthwith to take such delivery, on payment by them of the stipulated price above mentioned, with arrest in execution and costs of suit.

This demand is met by the plea that the dates, purchased by the Defendants, on the exhibition of a sample, were to be of good and marketable quality, which quality is formally denied, and set forth as the ground of the Defendants' refusal to take delivery of the bags, forming the balance of the 500 bags.

To this Plea it has been replied, by the Plaintiff, that the dates sold were and are of a good and marketable quality.

The only issue then, between parties, is the soundness or unsoundness of the dates purchased.

But whether the soundness should be established by the Plaintiff, who has asserted this affirmative, or whether the unsoundness should be proved by the Defendants, such unsoundness, though a negative fact, being necessary to establish his defence to the action, has been disputed.

On this point, we cannot do better than quoting the words of TAYLOR, on evidence, Vol. 1, Page 26, Section 268. Ed. of 1848. Cap. 3. Of the Burthen of proof.

"A third rule, (says the learned writer) "which governs the production of evidence, is "that *the burthen of proof lies on the party who* "*substantially asserts the affirmative of the* "*issue*. This rule of convenience, which, in "the Roman law, is thus expressed: *Ei in-* "*cumbit probatio qui dicit non qui negat*, has "been adopted in practice, not because it is im- "possible to prove a *negative*, but because the "negative does not admit of the *direct* and "*simple* proof, of which the affirmative is ca- "pable; and, moreover, it is but reasonable "and just that the party who *relies* upon the "*existence of a fact*, should be called upon to "prove his own case. In the application of this "rule, regard must be had to the substance and "effect of the issue, and not to its grammati- "cal form; for in many cases the party, by "making a slight alteration in the drawing of "his pleadings, may give the issue a negative "or affirmative form, at his pleasure."

In illustration of this proposition, the same learned writer, in the following paragraph, continues thus: "For instance, if, in an action of covenant or assumpsit, brought against a tenant, the breach assigned be that the premises were *not* "kept in repair, and "this allegation be traversed by the plea, the "*Plaintiff must prove his negative* averment; "for though, according to the grammatical "construction of the issue, the affirmative lies "on the Defendant, yet the *substantial merits* "of the case *must* be proved by the *Plaintiff*; "and if no evidence were given, or if the "allegation on which issue was joined, were "struck from the record, the Defendant will "clearly be entitled to a verdict and, as in every "case in which the Plaintiff grounds his right "of action upon a *negative* allegation, and "where, of course, the establishment of this ne- "gative is an *essential* element in support of his "claim,— TAYLOR. Evidence: loco 1 Page, "263).—so must the Defendant..... "prove all those facts, whether affirmative or "negative, which are *necessary* to establish "his defence to the action." (Same Author, Eodem loco. 1 P. 264.

Or in the words of TOULLIER, Vol. 8. P. 25 8th edition: "Restons invariablement attachés "à ce principe *fondamental*, dicté par la raison: "C'est à celui qui, soit *par action* soit *par* "*exception*, fonde sa prétention sur une *négative* "qu'incombe le fardeau de la preuve, *sans* "*exception*."

Moreover the time when the quality of the goods purchased, specially on samples, can be ascertained, is necessarily that of the delivery; therefore it is said by PARDESSUS:

"C'est *au moment* de l'arrivée des marchan- "dises que celui à qui elles sont adressées "doit exprimer son refus et les motifs sur les "quels il le fonde.... S'il ne s'élève de diffi- "cultés que sur la qualité, qu'il prétend n'être "pas celle convenue, il *doit faire constater* "*l'état* des choses, au *moment même de l'arrivée* "*ou dans le plus bref délai.*" Droit Com. 2. P. P. 274, 275. Article 106 C. de C.

These authorities clearly shew that the burthen of proof, in this cause, falls upon the Defendants. Their plea is nothing more nor less than a plea in confession and avoidance. The avoiding cause must necessarily be proved by that party setting it up as his defence; not proved, the contract would remain in its full force, and judgment would necessarily have to be given against him.

The next point to be examined is whether the Defendants have or have not proved the unsoundness of the dates purchased by them.

The Defendants have sought to establish the bad quality of the dates by the evidence: 1o. of their own Port clerk intrusted with taking delivery of the commodity purchased by them, to whom alone the whole matter was left by the Defendants; 2ndly, by the evidence of a clerk, taking delivery in the name of Seurin and Co., of 200 bags of dates, forming part and parcel of the same cargo of dates.

True it is that the clerk of Defendants speaks of the unsoundness of the dates, but it must be borne in mind that the clerk of Seurin and Co. has warned the Defendants' clerk of the defective quality of the dates, and cautioned him against taking delivery of the same, without reference to his principals, upon which the Defendants' clerk replied that he would nevertheless take delivery of twenty or thirty bags as he wanted them. No reference to the principals was ever made.

Assuming therefore the bad quality of the dates, it is apparent that the Defendants did not consider the difference in the quality to be such as to warrant the repudiation of the whole contract.

Having so far departed from the original contract, have they shewn that the dates, subsequently tendered to them, were of a quality far inferior to the other half of which they took delivery? Of this no sufficient evidence has been laid before the Court.

In the absence of such evidence, we should not be warranted in assuming that the last batch of dates were worse than the first, as such an assumption would be a presumption of fraud, against the Plaintiff, wholly inconsistent with that *bona fide* which is the very soul of all commercial transactions.

Judgment must therefore be entered for Plaintiff, in the terms of the Declaration, with costs, and arrest in execution limited to 3 years.

But, in as much as it is evident, from the deposition of Purtha, that he was part owner of the dates purchased by the Defendants, it is considered that the Declaration be amended by the joinder of Purtha as a Plaintiff, and that this Judgment be common and binding upon him as well as upon Omar Jacob.

Supreme Court.

ACQUÉREUR et VENDEUR,—ACTE DE VENTE,—CONDITION,—RÉSOLUTION DE VENTE,—TITRE,—PROCÉDURE—TITRES OFFERTS EN ÉVIDENCE.

Nul ne peut plaider contre son propre titre,—Quod ap probo non reprobo.

L'acquéreur doit exécuter les conditions de la vente; si au moment de la vente, de nouvelles conditions sont imposées insidieusement, la vente pourra être résolue.

No. 163 *des Réglemens de la Cour,* — *Etendue de son application.*

PURCHASER AND VENDOR,—DEED OF SALE,—CONDITIONS,—CANCELLATION OF THE SALE,—TITLE.—PROCEDURE,—TITLES TENDERED AS EVIDENCE.

No party can challenge his own title. Quod ap probo non reprobo.

The purchaser must perform the conditions in the articles of sale. If on the eve of the sale new articles are thrust surreptitiously into the conditions of sale, it might led to cancellation of the sale.

Rule of Court No. 163.—*How limited in its application.*

Number of Record: 7856

DAUGUET, PLAINTIFF.
versus
TALBOT & ORS, Defendants.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2. P. J.

J. L. COLIN,—Of Counsel for Plaintiff.
C. LABORDE,—Plaintiff's Attorney.
G. B. COLIN,—Of Counsel for Defendants.
F. ROBERT,—Defendants' Attorney.

30*th May* 1862.

The Plaintiff Gustave Dauguet setforth, in his Declaration, that a formal lease had been granted, on first June 1858, in favor of Charles Dauguet, by Antoine Jean Tom Talbot, one of the Defendants, of his (the said Talbot's) Estate *Mon Espoir*, in the District of Pamplemousses. The duration was for ten years, from and after first June 1858, the consideration being the sum of $20.000, payable n ten equal yearly instalments of $ 2000; and certain guarantees were given by one Chasle for payment of the price.

That the said Estate was sold to the Plaintiff, at the bar, on twenty second February 1861, for the sum of $13.500, and that the aforesaid lease, had been inserted in the CAHIER DES CHARGES, so that the purchaser might be bound to execute the same, and receive the price for which the Estate had been leased, with the benefit of the guarantees.

That on first March 1860 the said A. J. T. Talbot had transferred to one Mayer, (a Defendant) the two instalments of the price of the said lease, payable on fifteenth December 1861, and fifteenth December 1862, with corresponding guarantee, and that Mayer, in his turn, transferred this claim, on twenty eighth November 1860, to Marie Mélanie Zélie Talbot, Madame Esclapon, (the sister of Talbot) also called with her husband as Defendants.

The Plaintiff further setforth that these transfers were null in law; that he, the Plaintiff, as purchaser of the whole, came in place of A. J. T. Talbot, who could not dispose of the same; that the alleged transfers, by that person to Mayer, and by Mayer to Madame Esclapon, were fictitious, they being the mere "prête noms" of Talbot.

The Plaintiff therefore concluded that he was the sole person who ought to receive payment of the sums attempted to be tranferred by Talbot to Mayer, and by this latter to Mme Esclapon, with the guarantee given by Chasle.

To this the Defendants answered:

That the Plaintiff has no *locus* or *personæ standi*, in this cause, and that he is without any right, title or capacity to enter this action.

That the transfers made by A. J. T. Talbot to Achile Mayer, and by Achille Mayer to Esclapon the wife, are good and legal, and have been made BONA FIDE and for due and valid consideration.

That the said Esclapon the wife has caused to be inserted in the conditions of sale of the Estate *Mon Espoir*, purchased by the said Plaintiff, a clause stating that she was assignee and holder of the rights of Mayer, who was himself assignee and holder of the rights of Tom Talbot, for the sum of $4000. on the prière of the lease of the said Estate *Mon Espoir*, due and demandable on the 5th December 1861, and on 5th December 1862, and that the purchaser of the said Estate should not enjoy or receive the said $4000.

That the above clause has been read over by the Master of this court, on the day of the sale of the said Estate, and is consequently binding upon Plaintiff as purchaser of the said property.

G, B. COLIN for Defendants: I beg of submit, *in limine*, that the Plaintiff is out of Court. He has given no notice whatever of any evidence to be adduced by him, either parole or documentary, or of a single witness. No action can run, so smooth as to entitle the Plaintiff to Judgment, without either proof or admission.

J, L. COLIN for Plaintiff: The Defendants have given us full notice of all the documents and witnesses they intend to rely upon, and, by Rule of Court No. 168, I am entitled, without any counter notice, to adduce those documents and call those witnesses, if I please.

MR. JUSTICE BESTEL. The Rule in question was introduced to meet the case, which had actually occured in practice, of a party giving notice of his intention to use certain evidence at the trial, then deliberately keeping it back, and refusing to allow his opponent to bring it forward, on the ground of no notice. We cannot extend it farther.

HIS HONOR THE CHIEF JUDGE: The Plaintiff must begin and complete his case in the first place. He cannot complain of being misled by the Defendants, who has not yet opened his case. The rule will necessarily help Defendants who have been misled.

G. B. COLIN. I do not press the objection.

J. L. COLIN, for Plaintiff. I admit that, in general, it is difficult for a party to dispute the conditions of his own title, but this case is most peculiar. All the Defendants are either near relations, or on terms of great intimacy, and the whole is a mere scheme to deprive me, the purchaser, of the enjoyment of the produce of the Estate, which I have bought. Originally, in the *Cahier des Charges*, not one word was said about this lease of the Estate; the sale was at first announced for tenth May 1859, but a question of the cancellation of the vendors, rights arose, and much time was lost. Advantage was taken of this, by the Defendants, to combine together. The owner Talbot had no right, after the seizure, to assign any of his rights by transfer, but he surreptitiously pretends to assign and allow his near relations to creep in.

The clause about those transfers was added to the *Cahier de Charges* the very day of the sale, on a petition which had been presented to the Master, only the day before. We got no notice, two creditors appeared and protested. It was then too late to add more conditions. HUET. *Saisie Immobilière*. (1818) Page 163.

I came to the sale, I had no remedy, but to buy the Estate and seek my recourse afterwards. There was no Judgment of the Master which I could have appealed against. The fruits of an Estate go with the Estate itself, and no seller of an Estate can alienate them to the prejudice of a *bonâ fide* purchaser. SIREY. 1814, : 1 : 6. I have adopted the only remedy open to me.

G. B. COLIN, for Madame Esclapon. This is a mere attempt, by a purchaser, who finds it would be very convenient for him to put $ 4000 in his own pocket, to break his own contract and set aside his own title. More trumpery arguments cannot be imagined. One brother plays into another's hands to prevent my client getting payment under lawful and *bona fide* assignment. Not only was the lease, which the purchaser now attempts to repudiate, made part of the *Cahier des Charges*, and as such announced to the whole world, but the purchaser had three whole days, after the sale, to reflect coolly, before he took the bargain, as he did not appear at the sale himself, the actual purchaser declaring, three days after the sale, that he acted on account of the Plantiff.

So far was the original lease from being made after Talbot was under seizure, that it is dated twelve months before the levy. The lease was duly disclosed in the articles of sale, and the Plaintiff must perform all the conditions of a lawful contract C. C. 1134.

HUET, (quoted above) though perhaps an author of no great authority, merely says that conditions made surreptitiously, to the Cahier des charges, after publication, are void and would lead to the annulling of the sale. There is no question whatever with the creditors here. They have all been duly paid. We have only the extraordinary pretensions of the purchaser.

JUDGMENT.

It is a plain and obvious principle of law that a party cannot challenge his own title, for

that would be to cut the ground from under his own feet: *Quod approbo non reprobo.* If I found a title, I must take it with all its clauses. I cannot except those that are favourables to me and reject those that I do not like.

It is said that the clause, regarding the existing lease of the Estate *Mon Espoir*, was smuggled into the *Cahier des Charges* surreptitiously, on the morning of the day of sale. But a petition had been previously presented to the Master, who allowed the addition. The conditions of sale were openly read in the presence of all persons attending the sale, and the Plaintiff or his representative, then present, bought the Estate, under those conditions. He cannot now repudiate them provided they are lawful conditions, for that would be to break his own contract, and set aside his own title.

A case might be imagined of a fraudulent and surreptitious addition made to the *Cahier des Charges*, just before the exposition of the Estate to the bidder, and for that the Court would grant a remedy probably, by annulling the sale and ordering a new exposition; but such a remedy as is here attempted is quite inadmissible and could never be open to a purchaser.

Action dismissed with costs.

Supreme Court,

DIVORCE,—SÉPARATION DE CORPS,—SUBSTITUTION DE DEMANDE.

DIVORCE.—SEPARATION A MENSA ET THORO,—SUBSTITUTION OF DEMAND.

Number of Record. 6921

BLANCARD THE WIFE, Plaintiff.
Versus.
BLANCARD THE HUSBAND, Defendant.

Before:
The Honorable Sir J. E. RÉMONO 1. P. J. and
The Honorable N. G, BESTEL 2 P. J.

G. B. COLIN,—of Counsel for Plaintiff.
A. J. COLIN,—Plaintiff's Attorney.
A. LIONNET,—of Counsel for Defendant.
C. LABORDE,—Defendant's Attorney.

30*th May* 1862.

On the twenty sixth November last, the Plaintiff, who had entered an action for a divorce *a vinculo matrimonu* made a motion for leave, from the Court, to withdraw such action with the view of introducing another action for a seperation of body.

This motion was opposed, on behalf of the Defendant Blancard the husband, by Lionnet, who contended that the grounds for a total or partial divorce being the same in law, & those grounds being set forth in the demand before the Court, a simple declaration, on the part of Plaintiff, of her intention to reduce her demand for a total divorce, to a demand for a partial divorce, (séparation de corps) would be sufficient; especially as it was contended the demand for a total divorce might set forth libellous matters against the character of the Defendant which, it might be material, in the interest of the latter, should remain on record.

The Substitute Procureur and Advocate General than officially observed that the Defendant had not appeared to the action, except for the purpose of objecting to this motion, to which however he personally saw no objection.

JUDGMENT.

Article 306 C.C. is thus worded:

"Dans le cas ou il y a lieu à la demande en "divorce pour cause déterminée, il sera libre "aux époux de former demande en séparation "de corps.

The same grounds being required for a partial, as well as for a total divorce, a recorded declaration; on the part of a Plaintiff, of her intention to reduce her demand, for a total divorce, to a partial one might be sufficient to enable parties to proceed with the action for a partial devoice.—Or again an amendment of the conclusions of the demand would be quite sufficient to the same end.

If so, no incouvenience can possibly arise from the withdrawal of the action entered, specially when it is considered, that, upon the service on the Defendant, of the demand for the total divorce, the Defendant never appeared, either to show cause against the demand entered, or to complain of any libellous imputation on his character.

Leave is therefore granted to the Plaintiff, for the withdrawal of her demand for a total divorce, and for the substitution of one for a partial divorce. (Séparation de Corps.)

Costs against Plaintiff.

Supreme Court.

PROPRIÉTÉ ET POSSESSION.—C C. ART. 2230.
L'on est toujours présumé posséder à titre de propriétaire, jusqu'à preuve du contraire.
La possession perdue, par suite de fraude ou de violence, doit être rétablie, sauf à décider ensuite sur la question de propriété.

PROPERTY AND POSSESSION—C. C. ART 2230.
Every one is held to possess as proprietor, till the contrary be shewn.
Possession lost by a surreptitious taking was ordered to be restored immediately, leaving the question of right for after determination.

Number of Record: 286

AYACANOO, Appellant.
Versus.
NARAINSAMY, Respondent.

Before:
His Honor the CHIEF JUDGE.

A. LALOUETTE,—Of Counsel for Appellant.
V. LAVAL,—Appellant's Attorney.
C. M. CAMPBELL,—Of Counsel for Respon[dent.
U. HITIÉ,—Respondent's Attorney.

18*th June* 1862.

This was an Appeal from the Court of the Senior District Magistrate of Port Louis. The Plaintiff (now Respondent) set forth, in his demand, that, on the twenty ninth November last, the Defendant took out from the pocket of the Plaintiff's great coat, which was in the room then occupied by both of them, situate in Arsenal street, Port Louis, the license delivered to the Plaintiff, on the eleventh November last, by the Honorable the Collector of Internal Revenues, for vending lemonade &c. That though duly summoned to restore to the Plaintiff the said License, the Defendant has refused to do so. That, by keeping the said license, the Defendant prevents the Plaintiff from carrying on his business, and causes him great prejudice and loss. Wherefore the Plaintiff prays the Court to condemn the Defendant to restitute immediately to the Plaintiff, the license delivered to him by the Collector of Internal Revenues, as above stated, and to condemn the Defendant to pay to the Plaintiff the sum of one hundred and fifty dollars, as damages, with costs.

The Defendant, (now Appellant) in the Court below, traversed the whole statements of the Plaintiff. (Respondent.)

In the course of the trial, the Appellant produced the license, but only, as the Record bears, aftet very great delay and many observations. It was found to be in the name of the Respondent. The Appellant admitted that he had taken it from the pocket of the Respondent's coat, which was hanging up in his (Appelant's) house; but he contended that although the license was in the Respondent's name, the whole difficulties had arisen from the bad faith of the latter, who being a person of some education, while he (Appellant) could neither read nor write, had been engaged by the Appellant to act as his clerk or assistant in the business of selling lemonade &c, and while the Appellant had furnished all the funds for taking out the necessary license, and instituting the business, the Respondent had abused his confidence, had taken the license in his own name, and had assumed the attitude and position of the real owner of the enterprise. He therefore desired, in this action of delivery of the license and damages, to be allowed to go into the facts of the whole connection and actings of the parties.

It farther appeared that the Appellant, on second December 1861, had instituted criminal proceedings against the Respondent, before Mr. District Magistrate Esnouf, setting forth the alleged fraud of the Respondent, in taking out the license in his own name, and disposing of a donkey said to be the property of the Appellant. This complaint terminated, on twentieth January last, by the learned Magistrate dismissing the same, after hearing parties and the evidence, as, in his opinion, the case appeared to be a civil one between partners.

In the present action, now under Appeal to this Court, the learned Judge in the Court below refused to allow the Appellant to go into all these collateral inquiries, ordered the license, to be delivered to the Respondent, and awarded the sum of $100 as the damages sustained by the Plaintiff, from the license having been abstracted and withheld from him, with costs of suit.

It appears to this Court that the learned Magistrate properly refused to allow the Appellant, by way of exception, to go into details so wide of the actual subject of inquiry before him, in this case, and that the first part of the Judgment, ordering restitution of the possession of the license which had been lost, by stealth or the surreptitious taking by the Dependant, is correct.

It is a rule of general jurisprudence that *possession* which has come to a close *vi, aut clam, aut precario,* must be, at once, restored, (JUST. 4. 15. 6.) leaving the actual rights of parties to be afterwards ascertained.

For it must be remarked that, in questions of possession, the presumption is always that a party posesses for himself and as proprietor till the contray is shewn. C. C. 2230 "On est "toujours présumé posséder pour soi, et à "titre de propriétaire, s'il n'est prouvé qu'on "a commencé a posséder pour un autre."

In regard however to the matter of damages, it appears to the Court that, as the case is not free from suspicion, it will be safer to delay the determination of that question, till the Appellant shall have an opportunity, if he be so advised, to establish the case, which he alleges, in competent form.

The Court, therefore, while in the meantime affirming that part of the Judgment of the District Court, which orders restitution of the licenss to the Plaintiff, (now Respondent) before proceeding farther in the case, allows the Appellant fourteen days to institute legal proceedings, if he thinks proper, to vindicate his legal rights. The present case to stand over to wait the result.

All questions of costs reserved.

Supreme Court,

PROCÉDURE,—AMENDEMENT,—ARTICLE 73 DES RÉGLEMENS DE LA COUR.

Tout amendement dans la procédure, qui a pour but de changer la nature de la demande, ne peut être admis par la Cour.

La maxime "melior est conditio possidentis vel defendentis" a t elle force de loi à Maurice?

PROCEDURE, — AMENDMENT, — RULE OF COURT NUMBER 73.

An alteration in a pleading which altogether changes the nature of the action cannot be allowed as an amendment.

Is the maxim "melior est conditio possidentis vel defendentis" admitted by the law of Mauritius?

Number of Record: 5044

NAYNA & Ors., Plaintiffs.
Versus.
WIDOW PICOT & Anor., Defendants.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL, 2. P. J.

E. LECLÉZIO,—Of Counsel for Plaintiffs.
A. CHAUVET,—Plaintiffs' Attorney.
A. LIONNET,—Of Counsel for Defendants.
C. LABORDE,—Defendants' Attorney.

30th May 1862.

In this case the Judgment of the Court was as follows:

The Plaintiffs setforth, in their Declaration, that the late widow Nayna, being the proprietor of a landed property, at Pamplemousses, which she had bought, at the Bar, in 1841 for £6010, "finding herself in embarrassed "circumstances, from having guaranteed "certain claims, due by one of her relations, "for which she was prosecuted before the "Courts of Mauritius, and which claims have "been sometimes afterwards settled, had, by "an alleged deed, dated the thirteenth day of "August 1852, drawn up by George Marie "Frédéric Sévène, notary public, made a fic-"titious, simulated and colourable sale of the "said landed property to Jean Volpelière "Picot, her grand son, then under age, assis-"ted by Eugène Picot, his father, for £1000 "whereof the said deed bears acquittance."

The Declaration then stated some facts to shew that the sale was not a real one, that the alleged price had not been paid, that Widow Nayna died in 1854, that her heirs, for a series of years, enjoyed the said landed property as the owners thereof, that the said Jean Volpelière Picot was a mere cover or PRÊTE NOM, for Widow Picot, but that his Widow and son, as his representatives, have lately taken possession of the property, and retained the same. The Declaration therefore concluded for the cancellation of the alleged deed of sale, on which, it was contended, the property would fall to be restored to the Plaintiffs.

The Defendants met the Plaintiffs with a general traverse of their statements.

A very interesting discussion arose in the case, on the application of the rule of law usually expressed by the maxim: *in pari delicto, meli or est conditio defendentis vel possidentis.* On the one hand, it was maintained that this maxim applied directly here, and that the Plaintiffs were out of Court, as they stated expressly that the alleged sale had been effected between the late Widow Nayna and her grand son, for the fraudulent purpose of putting her property beyond the reach of her creditors. That this was the case of a *prête-nom* concurring with the seller to hold the property in *fraudem* of the legal and just rights of her creditors. That both parties being equally to blame, the law could never step in to give the one any assistance against the other.

The Plaintiffs, on the other hand, admitting that their real case was not so distinctly stated in their Declaration, as it might have been, contended that they were entitled to strike out the words, from their pleading, implying that there was any fraud or impropriety of conduct in the transaction. That in fact, widow Nayna was an old, uneducated, infirm woman, and that if there was any imposition at all practised in the matter, it was practised upon herself; that there was no *paritas* in the delict, supposing it proved, and that, in any view, the rule of law, in PARI DELICTO *melior est conditio possidentis vel defendentis*, was law in Mauritius.

We should regret to think that the laws of Mauritius, unlike every other system of ju-

risprudence with which we are acquainted, should not acknowledge the principle generally stated in the maxim above quoted, although it may be with some modifications not precisely recognised by the laws of England and Scotland. The maxim is one of the ancient Civil Law, the basis more or less marked and acknowledged of all our modern systems ; but to what precise extent it may be recognised in Mauritius we forbear, at present, giving any opinion.

The Plaintiffs have moved the Court to be allowed to amend their Declaration, by striking out all that relates to the apparent fraudulent nature of the deed of sale. This we cannot allow, as the result would be, not to amend, but to change the whole nature of the case. From the explanations submitted to the Court, it is very probable that the Plaintiffs may have a remedy, but we do not think that it can be made good under this Declaration.

Mr. Leclezio.—I shall elect to be non-suited.

His Honor the Chief Judge.—Call the Plaintiff.

Plaintiff called, Nonsuit entered.

Bail Court.

Appel d'unjugement demagistrat Stipendiaire. — Refus de travail,— Pénalité,— Récidive.—" Autrefois acquit. "

Lorsque le prévenu plaide " Autrefois acquit," il doit prouver, non seulement que l'offense dont il est accusé est de la même nature que celle pour laquelle il a été déjà condamné, mais encore que l'offense a été commise au même endroit à la même époque et entre les mêmes parties.

Appeal from a judgment of a stipendiary Magistrate,—Refusal of Work,—Repetition of offense,—" Récidive, "—" Autrefois Acquit. "

When the party charged pleads " Autrefois acquit;" he must prove, not only that the offence where of he is accused is of the same nature than that for which he has been already convicted, but also that the offence has been commited at the same place, at the same time and between the same parties.

Number of Record. 38

ITOO & ors—Appellants.

versus

BARON, MOON and ors.— Respondents.

Before :

The Honorable N. G. BESTEL 2. P. J. and in presence of :

The Honorable the Procureur and Advocate General.

G. B. Colin,—of Consel for Appellants.
Slade & Banks,—Appellants' Attornies.
J. L. Colin,—of Counsel for Respondents,
E. Duvivier,—Respondents' Attorney.

13 *May* 1862.

This case was of some importance. One of the main pillars of our prosperity was at stake, viz : our manual labour.

Our local Ordinance on the subject provides that the Indian labourer shall, at the end of his contract of service, replace to his employer his days of unlawful absence.

In this cause an attempt was made to elude that beneficient law, the safeguard of our landed properties, and the most effective check, hitherto put by the local Government, on the natural tendencies of our Indian Immigrants to vagrancy.

Itoo and Ors., of the *Money Musk* Estate, in the District of Moka in this Island, having completed their contract of service, on the said Estate, had according to the above mentioned law, to replace a certain number of days of vagrancy. They refused to go to work, and were sentenced to imprisonment for that offence.

On leaving prison, they again refused to go to work to make good the days they had been absent.

A new complaint was lodged, and a second term of imprisonment pronounced against them by the Stipendiary Magistrate of the District. From this second jugdment they appealed to the Supreme Court.

The Honorable Procureur and Advocate General on account of the gravity of this case, thought fit to attend on the day of the hearing of the Appeal and to submit to the Supreme Court his " conclusions" upon the debate.

Considering the importance of the subject we have thought proper to report at full length and to our best, these " conclusions."

The case is, as just said, an Appeal, by Itoo and others, Indian laborers, from a Judgment of the Stipendiary Magistrate in and for the District of Plaines Wilhems, convicting them, the then Defendants and now Appellants, of having illegally absented, on the 12th of February now last past, from the *Money Musk* Estate, the joint property of the Plaintiffs, now Respondents, thereby neglecting their work, and ordering them to return forwith to the said work, on the said Estate,

failing which it was ordered that they be imprisoned for fourteen days with hard labour.

On the 17th February last, the respective parties appeared before the Stipendiary Magistrate, when the then Defendants and now Appellants, pleaded as follows:

"That having already suffered imprison-
"ment, for refusing to return, as ordered so to
"do, to work on the Estate *Money Musk*
"aforesaid, the Court has not the power to
"punish them, a second time, for the same
"offence; that they will not return to work on
"*Money Musk*, and do now claim their dis-
"charge."

The fact of a previous conviction and punishment, for having refused to return to work on *Money Musk*, when ordered to do so, on a previous occasion, is admitted by the Stipendiary Magistrate, in the Judgment now appealed from. Nevertheless he has not hesitated to overrule the plea of the Defendants, and now Appellants, on the ground that:

"The Defendants now (that is on the 17th
"February last) appear to answer a fresh
"complaint exhibited, as already stated, on the
"twelfth February instant, setting forth that
"they are illegally absent from the said *Mo-*
"*ney Musk* Estate, thereby neglecting their
"work, and that they refuse to return to
"*Money Musk* Estate."

The then Defendants, feeling themselves aggrieved by the rejection of their plea of "Autrefois convict," and of the consequence entailed by such rejection, have lodged this Appeal, upon which the Court is asked to quash the Judgment complained of.

Parties having been heard on both sides, the Honorable the PROCUREUR & ADVOCATE GENERAL then rose and said:

"This case is of so much importance, not merely to the parties immediately concerned, but to all the planters and Indian labourers in the Colony, that I deem it proper to lay before the Court my "conclusions" on the debate."

After a *résumé* of the proceedings, the Procureur General continued:

"The learned Counsel for the Appellants rests his case mainly on the plea of AUTREFOIS CONVICT. He says the Appellants, having been already convicted and punished for refusal to work, cannot be again convicted and punished for the same offence.

The question is: are the two offences the same? He pleads they are. The Counsel for the Respondents, maintain they are not.

They are the same in kind, in *species* and in law; no doubt. But are they so in fact?

Their dates are different. An interval of a fortnight occurred between them.

The work on the two occasions must have been different, for the Estate had progressed in the interval. It was to clean or manipulate a different set of canes, to prepare different syrups, to convey to town different sugars, or bring out different provisions.

In the dates and in the actual work to be done there was therefore no identity.

Yet it is said that a repetition of the same refusal was no new offence.

If a soldier, ordered to stand sentry, on the first of the month, refuses and is sent to prison; and on coming out, refuses to stand sentry at the same place, on the fifteenth, can he plead his former punishment as an excuse for his second refusal? Of course not. And still less can he escape punishment for refusal to do different work, on his release, on the ground that he has already been punished for his previously refusing entirely different duty, weeks or months before. His second refusal is aggravated by being a repetition of the offence, and he will be punished with increased severity.

Or if a seaman refuses duty to furl topsails,—on the first of the month, and is put in irons for a fortnight; and if on coming on deck again he refuses other duty, say to lower a boat, the vessel having sailed some hundred miles, in the interval,—the weather, climate, locality and sea being all different,—will he not be punished again and with more severity, as he has been guilty, not merely of refusal of duty, but of contumacious and stubborn disobedience?

Or, again, if a labourer under contract, refuses to work, during the first week of his contract, will the punishment inflicted for that offence free him from the obligation to work during the rest of his contract? Can he plead his former punishment for a refusal, on a different date, of a different work, as an *Autrefois Convict*?

I submit that would be to render nugatory all his obligations; for all he would have to do would be to refuse work once; and on being punished for that, he would be entirely free from his contract!

These illustrations are exactly parallel to the present case. The second refusal is a repetition of the offence, the same in kind, but different in fact. It should be punished more severely as a "recidive," in place of remaining unpunished on the grounds of *Autrefois Convict*.

The hardship of the case is insisted on; it is said that the Appellants, will not be engaged again with their old band, a great misfortune for them.

That they will suffer for their offence, and that, indirectly as well as directly, is no reason for not letting the law take its course. They alone are to blame for a refusal which caused them such a misfortune. Besides, the same argument would have applied to the first imprisonment, and would be a ground for never imprisoning an Immigrant at or near the end of his contract. The proper line of argument is that the law, contemplating the dislike which Indians have to be separated from their companions, held the fear of that punishment over their heads as a strong motive to make them work out their contracts steadily.

The Counsel for the Appellants, also rested his case partly on the terms of the Ord. 16 of 1852 and 21 of 1854. He contended that the former of those Ordinances is not repealed by the latter, and that the Stipendiary Magistrate ought to have applied its provisions, which (§ 24) allow only one imprisonment to be inflicted, in case the Immigrant refuses to work during the prolongation of his contract, for unlicensed absences. It is farther maintained that Section 5 of Ordinance 21 of 1854 supports that view, and prescribes the mode in which these prolongations are now to be enforced.

It appears to me that the case does not at all involve the question whether the Ordinance of 1852 is repealed.

The Ordinances on Immigration have been numerous; they have also been, in a great measure, experimental; and provisions have been made, in one year, with care, only to be altered a year or two afterwards, on the test of experience having proved them to be inexpedient.

This was the case regarding the Ordinance of 1852. Its provisions, as to unlicensed absences, were found in 1854 to be insufficient; so that, in place of requiring the absentee to make up only one day's work for each day's absence, as prescribed in 1852, the law of 1854 doubled that penalty, and required him to make up double the time of unlicensed absences.

In 1854 also the question was decided how this obligation should be enforced. Whether by one punishment, after enduring which the Immigrant should be free to engage, or by treating the additional time as a prolongation of the contract, and repeating the punishment for each refusal of duty?

The Ordinance 16 of 1852 adopted the former of those alternatives. By section 24 it provided that, in case of the Immigrant refusing to obey the Stipendiary Magistrate's order, "to complete the said engagement by "making good the time of absence," "the said "Immigrant shall be liable to Imprisonment "with hard labour, for a period not exceeding "one month, after which time it *shall be* "*lawful* for the Magistrate *to grant certificate* "that he is free to engage."

Thus one imprisonment alone was lawful under that law. After suffering that, the Immigrant got his discharge, and was freed entirely from his old contract and its penal prolongation.

The Ordinance of 1854 adopted the opposite system. After providing that the Immigrant should make up two days work for each day's absence, it provides that "the Stipendi-"ary shall, upon request of the employer, "*refuse to discharge* such Immigrant, until "he have completed double the time of such "unlicensed absence."

The Immigrant being undischarged, was thus still under engagement. He was entitled, on the one hand, to wages and rations; on the other, he was bound to work, as if the prolongation were part of the contract.

In fact, the double time was thus made a statutory prolongation of the original contract, which, with all its rights, duties and obligations, was extended over the additional period so added to it.

It follows then, that every refusal of the Immigrant to work, during that period of prolongation, could be punished in the same way as a refusal during the original contract; for it would be a refusal of labour lawfully due by the contract as extended by the Ordinance.

The 5th Section of Ordinance 21 of 1854 is not at all inconsistent with this view. It provides for the mode of enforcing certain sentences, which had been pronounced *before* it passed, by which Immigrants (but only new Immigrants,) should have to make up the time of their absences, at the end of their engagements, and that, months or years after the Ordinance should have come into operation, and the system under the Ordinance of 1852, should have been abolished.

It provides that if any new Immigrant, who "has been sentenced under the 24th "Article of the Ordinance of 1852, to make "good, to his employer, the time of unlicensed "absences" shall refuse to obey that order, he shall, "instead of the punishment to which "he would be subject, under the aforesaid "article, be liable to an extension of double "the time of his unlicensed absences." The law thus assimilated the penalties, in such cases of past absences,— but prospective refusals to make up the time of absence,—to those which

it introduced for prospective absences and prospective refusals. And the operation of the article was limited to the mode of enforcing judgments which had actually been pronounced but not fulfilled, at the passing of the law. It has therefore no application to this case, in which the condemnation to make good double the time of unlicensed absences, was pronounced under the Ordinance 21 of 1854 itself, and without any reference at all to the law of 1852.

The only remaining argument, in support of the Appeal, is that if the Judgment is sustained, the Imprisonments may be *ad infinitum*; for they may be repeated *toties quoties*, on each refusal to work; and the law cannot admit of imprisonment for life, for a paltry offence of merely refusing to work under an individual master.

It seems to me that the law has advisedly left the Magistrate this extensive power; for it is part of the public policy of these Immigration Ordinances to teach the Indian that while he will be protected by the law, he must obey it; and that a wilful refusal,—still more repeated refusals—to obey the Magistrate, who is the local organ of the law, will be punished in succession, and until the Indian shall come to a sense of his duty and obey the law.

His refusal is a contempt of Court, a contempt of the law, and as such it is punished. Nor can he be heard to complain of a succession of punishments which he has brought down on himself, by his repeated refusals to submit to the law. It is in his own power to save himself by obeying the law; till he does so he must suffer for his contumacy.

The Records of Courts of Justice are full of cases in which Imprisonments, for many years, have been suffered for contumacious refusal to obey the law; and the hardship of such cases has never been sustained, as a reason for curtailing the power of Courts to compel obedience.

The conclusion at which I have arrived therefore is that the arguments, in support of the Appeal, are unsound: and that the Magistrate was entitled to enforce his Judgment that the Appellants should make good double their unlicensed absences, to enforce it by imprisonments repeated *toties quoties*, till the Immigrant should submit, and obey his lawful decree.

In point of strict form the sentence of imprisonment should have been pronounced in terms of the Order in Council of 17th September 1838, for "neglect to perform stipulated duty." But although not so expressed technically, the sentence was, substantially, for such neglect, and as mere error of form does not vitiate a Judgment of a Stipendiary Court (Order of Council as above Sec. 5, and Ordinance 15 of 1852 Sec. 22). I consider this Judgment to be substantially correct and valid.

On these grounds, submit to the Court that the Appeal should be dismissed, and I am happy that this view is the one most consistent with supporting the majesty of the law and preserving order among the Immigrant labourers in the colony."

The Court took time to consider and delivered Judgment as follows:

JUDGMENT.

It is doubtless that the plea of *Autrefois Convict*, on a former conviction for the *same identical* crime..... is a good plea in bar to an Indictment; the same principle, as the plea of *Autrefois Acquit*, that no man ought to be twice brought in danger of his life for one and the same offence; (See Black. Com. 3. 335). but, that it should be a good bar to a subsequent Indictment, Criminal Information or Charge, it is absolutely necessary that the offence or crime charged, on a subsequent Indictment, should be the *very same identical* offence or crime of which the party charged has been convicted on the previous Indictment.

Is this the case in the present instance? Certainly not.

In the first place it is difficult to understand how an offence, charged to have been committed on the twelfth February can have been committed, say in the previous month of January, when the facts charged had not yet come into existence.

In the second place, that a similar or like offence, to the one charged to have been committed on the twelfth February, had been committed, say on the month of January preceding, would prove the existence of two offences of a similar and like description and nature, at two different times, but not that the offence committed, on a *subsequent* day, is the very same identical offence as the one *previously* committed and upon which Judgment had been given.

Moreover the mere variance in the dates on which the several offences are charged to have been committed, is sufficient of itself to establish the repetition or (recidive) of the same or similar offence, but necessarily excludes the possibility of the offence of the twelfth February, in the second Information charged, being the very same identical offence as the one disposed of by the Magistrate in the previous month of January.

This identity of offences failing, it is evident that the Magistrate was fully warranted in law in overruling the plea pleaded and proceeding to Judgment.

The Judgment must therefore be and is affirmed, and it is ordered that this Appeal be dismissed with costs.

Bail Court.

MANDAT D'ARRÊT ET DE PERQUISITION, — PRISON PRÉVENTIVE, —INNOCENCE DU PRÉVENU,—ACTION EN DOMMAGES ET INTÉRETS.

Toute personne qui, sur une plainte en justice, en fait incarcérer une autre, qui parvient ensuite à prouver son innocence ne peut se soustraire au paiement de dommages et intérêts, qu'en prouvant l'existence du délit dont elle s'est plaint et de fortes présomptions contre le prévenu qu'elle a fait incarcérer.

SEARCH WARRANT,—PROVISIONAL ARREST, —INNOCENCE OF PARTY CHARGED,—ACTION IN DAMAGES.

A person who causes another to be incarcerated on a criminal charge, who turns out to be groundless, to save himself from a claim of damages, must establish that the crime was really committed, and that he had reasonable and probable cause for believing that the person incarcerated was guilty.

Number of Record :

GOVINDACHETTY, Appellant.
versus
ANDRÉ, Respondent.

Before :
His Honor the CHIEF JUDGE.

F. BRUNET,—Of Counsel for Appellant.
A. J. COLIN,—Appellant's Attorney.
J. ROUILLARD,—Of Counsel for Respondent.
F. VICTOR,—Respondent's Attorney.

13*th June* 1862.

The Court delivered Judgment, as follows :

In this case some questions arise of public importance. The general law, on the subject, is clear and well ascertained, but its application to the varying circumstances of particular cases is sometimes attended with nicety.

The facts are these :

In the beginning of the month of February last, the fowlhouse of the Respondent André was broken into, during the night, and a number of turkeys, geese, and ducks were carried off.

The next day, he gave information of the larceny to the Police, and his servants being on the outlook, one of them, a few days thereafter, informed his master, that he had seen two of the turkeys, on the high road, near the Appellant's shop.

André proceeded, with another servant to the spot, and both being satisfied of the identity of the birds, the Respondent went to the Police Station, and took out the usual search-warrant, in cases where it is believed there is a prospect of finding the stolen property.

The Warrant was executed by a constable of the District, and the turkies, found in the possession of the Appellant, and the Appellant himself, were conveyed to the Police Station, where he was detained a night and part of the next day, when no complaint being preferred against him, he was liberated.

He then raised the present action of damages, against the Respondent André, and clearly established in evidence, that the fowls were his own and not André's.

The learned Judge, in the Court below, dismissed the Plaint, with costs, "being of "opinion that the Defendant (now Respon- "dent,) was not answerable for damages."

Govindachetty appealed.

Whenever a private citizen sets the machinery of the law in motion against another, and causes him to be apprehended, on a criminal charge, he acts at his own peril. To defend himself against the serious claim of damages which may arise out of such proceedings, the party who has taken the initiative must establish two things ; *first*, that the crime has been committed by some one ; and *second*, that he had reasonable and probable grounds for believing, that the person against whom he has taken legal proceedings, was the actual perpetrator.

Now, in the present case, as to the first of these points, the larceny of the fowls, there can be no dispute. It is admitted in all hands.

As to the second, not only did André believe that the turkies, which were found in the possession of the Appellant Govindachetty, were his (Andrés) property, but two other persons entertained the same opinion, and so stated to André. Supposing then there were nothing more in the facts, although the position of the Appellant is a hard one, the case would fall within that class, where it is sometimes said, there is *damnum absque injuria*, and as no one can be shown to be in fault or to blame, it is impossible for the law to step in and give redress. That the Respondent, and the two others who thought that the turkies belonged to him, were in perfect *bonâ fide*, and entertained no malice, either malice in fact, or malice in law, (which arise from the want of probable cause) against the Appellant, is quite clear. They honestly, though erroneously believed that the turkies belonged to André, and Govindachetty was quite a stranger to them.

But it farther appears, from the evidence, that the Respondent, being very ill and in bed, did not himself accompany the officer, when the warrant was executed, but sent a servant in his stead. Now this servant was, undoubtedly, the agent of the Respondent, and if he had acted oppressively or illegally in the matter, his master would have been responsible. It appears, however, that so far from pressing the case against the Appellant, and urging his apprehension on the warrant, the servant wished the turkies to be taken to his master, (the Respondent) apparently for further investigation as to their identity; but the Constable would not agree to this, but took the Appellant and the birds into custody.

The Appellant, as we have seen, was detained at the Police Station, till next day, when he was liberated, as no one appeared against him.

In such circumstances, the Court can see no ground for subjecting the Respondent in damages; not only is there no trace of malice, but there was probable cause for all that was done; and the Respondent, by his agent, on the spot, endeavoured to stop the execution of the warrant. The argument, that the constable was the agent of André, and that the latter is responsible for all the actings of the former, however wrong headed or unauthorized by André, is, in the opinion of the Court, in the established circumstances of this case, too refined and subtle to form the basis of a Judgment awarding damages.

The Judgment of the District Magistrate must therefore be affirmed, and the Appeal dismissed, but without costs.

Supreme Court,

SAISIE ARRÊT,—CAVEAT,—ASSIGNATION EN LA CHAMBRE DU CONSEIL.

ATTACHMENT OF MONIES,—CAVEAT,—SUMMONS TO APPEAR IN CHAMBERS.

LEPOIGNEUR, Attach. Party.
versus.
WIDOW HITIÉ, Defendant.
AND
HENRI CHAUVIN & Ors. Garnishees.

Before:
His Honor the CHIEF JUDGE.
Sitting at Chambers.

F. ROBERT,—Attorney for Attaching Party.
F. MALLET,—Attorney for Defendant.
E. LECLÉZIO,—Attorney for Garnishees.

On 17th June instant, a Rule issued, by order of the Honorable Judge at Chambers, on the application of Widow Hitié, calling on Lepoigneur to shew cause why the attachment lodged at his request, against monies belonging to the said Widow Hitié, in the hands of the said Garnishees, by usher Rémy, on the 4th day of the present month of June, should not be quashed, set aside and declared null and void to all intents and purposes. The so called attachment, so complained of, was in the following terms:

"Mauritius, to wit: Take notice that "Elphèse Lepoigneur, of the Distrit of Black "River, at the place called "Petite Rivière," "proprietor, having chosen his legal domicile "in the office of the undersigned attorney at "law, without in any way admitting the "alleged claim of Fanny Jacques, widow of "the late Tudelai Hitié, mortgaged on the "property sold by him, the said Lepoigneur, "to you, does hereby warn you that he will "enter, before the Supreme Court of Mauri-"tius, an action, claiming from the said widow "Hitié the sum mortgaged on the said property "on her behalf, as damages, because she sold "to him a quantity of water, of nine inches dia-"meter, with the property sold by her to him, "according to a notarial deed, drawn up by "Aristide Meistre and his fellow notaries "public, at Port Louis, dated the second day "of June eighteen hundred and fifty seven. "and Registered in Reg. C. 88. No. 2707, "when she was not entitled to any quantity "of water whatsoever, and does hereby object "to any payment to be made by you, to the "said widow Hitié, in your capacity of third "holder of the said property, as alleged mort-"gaged creditor of the said property. Under "all reservations."

ROBERT, for Lepoigneur, shewed cause. I am just about to raise my suit, in the Supreme Court, against Madame Hitié, who is clearly liable in damages to me, for selling me water which did not belong to her, and of which I have been deprived. If my attachment, or *Caveat*, is not supported I shall have no security for recovery of the large claim I have against her. If she will find bail I will at once withdraw it.

MALLET, for Madame Hitié: I altogether deny the alleged claim of damages. If it ever existed, it has been lost by the conduct of Lepoigneur, who compromised the case. There is no foundation whatever for this *Caveat* and I am entitled to get payment of my own money without bail.

LECLEZIO, for Chauvin, stated that he was quite ready to pay the money, all he wished was that he should not, owing to the warning given him, be liable in any risk.

HIS HONOR THE CHIEF JUDGE: I am not aware of any authority in the law of Mauritius for the proceeding called a *Caveat*. In England, such a proceeding, in similar circumstances, is quite unknown. Until Judgment is obtained against a debtor nothing can be done owards attaining payment or security, unless

the debtor is about to leave the country, or the suit is depending in the Lord Mayor's Court of London, and some other places, under what is called a foreign attachment. In Scotland, the law goes farther than most other systems in allowing an attachment or *arrestment*, as it is called, of a debtor's funds concurrently with raising the action, and the matter will be at once equitably arranged, according to the circumstances of the case, by application to a Judge.

In Mauritius, there must be a proper title; (titre authentique ou privé. Code Civil Procédure. Article 557.) If there is no title the authority of a Judge is required. (Article 558.)

To allow a private person, at his own will and caprice to lock up, to the hands of a third party, the funds of an individual, who is, or is fancied to be, indebted to him, would led to great abuses.

The law of the Colony is quite sufficient to meet all ordinary cases; it is probable that the Court, in extraordinary circumstances, where justice plainly requires its interference would, by injunction, on a regular application, supported by affidavits, make such summary orders as would effectually protect the rights of parties appearing to be in danger; but here no application of any kind was made for judicial authority.

The attachment, or *Caveat*, must therefore be declared null and void to all intents and purposes with costs.

Supreme Court,

CESSION DE BIENS,—CONCORDAT,—SUSPENSION DE LA PROCÉDURE EN EXPROPRIATION FORCÉE.

CESSIO BONORUM,—AGREEMENT,—STAYING THE SALE BY LEVY.

CESSIO BONORUM of V. and T. MERVEN.

Before:
The Honorable N. G. BESTEL, Commissioner.

20th May 1862.

On the hearing of this matter, a motion was made, by LECLEZIO and others, for their respective clients, for the staying of the sale of the Estate *L'Unité*, the separate Estate of Victor Merven, and of the Estate *L'agrément*, the joint property of the said Victor Merven and Thomas Merven.

Against the granting of the motion DOUGLAS, on behalf of the Oriental Bank, urged that the two Estates had been separately seized, and were to be put up separately for sale.

JUDGMENT.

The seizure being anterior to the signing by the Bank, of the proposed arrangement laid before the Court, this necessarily implies an intention, on the part of its manager, not to make any innovation in the rights of the Bank, but that the sale of the two Estates seized should not take place before a decision, should have come to by the Court on the proposed arrangement.

The affirmation of this arrangement by the Court would supersede the necessity of the sale of the two Estates seized.

Therefore my Judgment is that the sale of the Estates *L'Unité* and *L'Agrément* be stayed until further Orders.

In reference to the Petition, deposited in Court with the Registrar, for leave, on behalf of Victor Merven, to make a "Cessio Bonorum," I have to say this only, that the Petition is drawn up in such a manner that I must decline to take it into consideration, except it be to order that it be not filed.

Supreme Court.

LETTRE DE CHANGE,—PROVISION,—ACCEPTATION,—CODE DE COM. 116, 117, 121.

Tant que la Lettre de Change n'est pas acceptée du tiré, la Cour ne considérera point ce dernier comme lié, même lorsque le porteur propose de prouver qu'il y avait provision.

BILL OF EXCHANGE,—PROVISION,—ACCEPTATION,—CODE DE COM. 116, 117, 121.

When the Bill of Exchange is not accepted by the Drawee, the Court will not consider the latter as bound, even if the bearer offers to prove the existence of a provision.

Number of Record 7301.

DE NANTEUIL, Plaintiff
versus
P. BOHLER & Co., Defendants.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL, 2d P. J.

DE NANTEUIL,—Of Counsel for himself.
J. H. SLADE,—Plaintiff's Attorney.
G. B. COLIN,—Of Counsel for Defendants.
E. LAURENT,—Defendant's Attorney.

20th May 1862.

This is an action for the recovery, from the Defendants, of the sum of £10.500, being the total amount of four Bills of exchange, in

the Declaration setforth, together with interest at 12 o|o, arrest in execution and costs.

The cause was finally heard on the thirtieth April 1862, when the Court took time to consider.

JUDGMENT.

This action was opposed on several grounds, and more especially by reason of the non acceptance of the Bills by the Drawee.

To this objection the Plaintiff replied that, upon the evidence of the existence of a provision, in the hands of Defendants, the latter was bound to accept.

Assuming the existence of the necessary provision, the obligation, on the part of the drawee, to accept the Bills drawn, and the refusal of such acceptance, nevertheless the Court is of opinion that this action cannot and ought not to be maintained, in the absence of any *vinculum juris* between parties.

This absence arises from the non acceptance by the drawere. For, says Article : 121. C. C. " Celui qui *accepte* une lettre de change con- " tracte l'obligation d'en payer le montant."

That such refusal of acceptance, by the drawere, having in hand the necessary provision, might warrant an action in damages against the Defendants, for the wrongs sustained by their refusal of acceptance, is another matter altogether and will be a fit and proper subject for the consideration of Plaintiff, but under this record it is a matter with which we cannot competently deal.

But the action now before the Court must be and is accordingly dismissed, with costs

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Supreme Court.

DÉLIT—MISDEMEANOR.

CONTRAVENTION A LA LOI SUR LES DISTILLERIES,—AMENDE ET EMPRISONNEMENT,—ORD. Nos. 29 DE 1853 et 8 DE 1861.

En matière de délit les accusés n'ont pas droit à une notification de la liste des témoins à charge et des pièces de conviction, comme en matière criminelle.

BREACH OF THE DISTILLERY LAWS,—FINE AND IMPRISONMENT,—ORDS. Nos. 29 OF 1853 AND 8 OF 1861.

In cases of Misdeamanour, the accused are not supplied with a list of witnesses and documents, to be used against them as in crimes.

THE QUEEN, Plaintiff.
versus
ROBERT & ORS, Defendants.

Before :
His Honor the CHIEF JUDGE.

S. J. DOUGLAS,—Subs. Proc. & Adv. Gen.
E. NOLIN,—Crown Sollicitor.
C. B. COLIN,— } of Counsel for Defen-
L. ROUILLARD,— } dants,
W. D. BOLTON,— }
C. LABORDE,—Defendants Attorney.

June 1862.

In this case of misdemeanor, the Information, containing three counts, was in the following terms:

" Mauritius. } Be it remembered that on
" To wit } this 19th april 1862 the
" Honorable William Gillepsie Dickson, Her
" Majesty's Procureur of Advocate General,
" in and for this Island of Mauritius, informs
" the Court that, heretofore, to wit: on the
" twenty first day of February 1862, in the
" District of Grand Port, in this Island afore-
" said, one Tandrayen and one Naraynen,
" both of the said District of Grand Port,
" laborers, did knowingly remove, from the
" distillery of one Arthur Martin, situate in
" the District of Grand Port, a certain quanti-
" ty, to wit, eight gallons of spirits, without
" the same being accompanied by a proper
" permit, as by law required, against the
" form of the Ordinance, in such case made
" and provided, whereby and by force of the
" Ordinances in such case made and provided
" the said Tandrayen and Naraynen have,
" over and above all other penalties and
" forfeitures, to which they may be liable, by
" virtue of Ord No 26 of 1855, each and every
" of them, incurred a penalty not Exeeding
" £ 100, and, in addition thereto, are liable
" to Imprisonment for a period not excee-
" ding six months, and the said spirits have also
" become liable to forfeiture.

" And Her Majesty's Procureur and Advo-
" cate General aforesaid further gives the
" Court here to understand and be informed,
" that heretofore, to wit: on the day and year
" aforesaid, at the place aforesaid, one Richard
" Ambroise Robert, of the said District of
" Grand Port, operative distiller, and one
" Hussanee, a laborer, (and two other persons,
" defended by Bolton, and against whom the case
" was abandoned in the course of the trial)
" did aid and abet in the illicit removal, with-
" out a permit as by law required, of a certain
" quantity, to wit: eight gallons of spirits,
" from the distillery of Arthur Martin, situate
" as aforesaid, against the form of the Ord.
" in such case made and provided, whereby
" and by force of the Ordinances in such case
" made and provided, the said Richard Am-
" broise Robert, Hussanee, and others have,
" each and every one of them, incurred a
" penalty not exceeding £200 and in addition
" thereto, have been liable to imprisonment,
" for a period not exceeding twelve months,

" and the said spirits have become liable to " forfeiture.

" And Her Majesty's Procureur and Advo- " cate General aforesaid further give the " Court here to understand and be informed " that heretofore, to wit:on the day and year " aforesaid, at the place aforesaid, a certain " quantity, to wit : eight gallons of spirits, "which had before them,been illicitly removed " from the distillery aforesaid of Arthur Mar " tin aforesaid,were found on certain premises " situate at Mahebourg, in the District afore- "said,and occupied bythesaid Richard Ambroi- " se Robert,he the said Richard Ambroise Ro- " bert then being cognizant of such spirits " being there deposited, against the form of " the Ordinance in such case made and pro- " vided, the said Richard Ambroise Robert " has incurred a penalty not exceeding £200, " and has further subjected himself to impri- " sonment for a period not exceeding twelve " months, and the said spirits have also " become liable to forfeiture. (Signed) W. " G. Dickson. Procureur and Advocate Ge- " neral."

Before the trial began Madhub, one of the accused, on the motion of the Crown, was discharged under art. 100, of Ord. No. 29, of 1853, that he might be taken as a witness for the prosecution. A plan of localities and of the distillery, with sections of the building prepared and verified on oath by J. L. F. Target, sworn land surveyor, was put in by the Crown.

After the Surveyor was in the witness box and sworn,

G. Colin, for the defence, maintained that a list of witnesses and of documents, to be made use of by the Crown, should have been served upon the accused, as in the other cases before the Court of Assizes. He relied on Arts. 43, 51 and 53 of the Criminal Procedure Ord, above quoted, and said that he was prepared to prove that a proper demand had been made, at the Registry. but that no such list was to be found there; he also stated that, in the case of *Galéa*, who was tried before a Jury for a misdemeanor, when that was the form of procedure, a list of witnesses and documents had been served.—Counsel admitted that the practice was adverse to what he desired but the practice ought to be altered. He moved accordingly, that the case should be delayed.

Douglas answered. The motion even if well founded, was too late, as the first witness was not only "called" but sworn, (above Ordinance Section 52) but the practice, for the whole 9 years, since the present form was introduced, was in opposition to the motion now made, and to the law on the subject, This was a misdemeanor merely, not a crime; neither treasons nor felony, to which cases the provision of the Ordinance is limited; a mere *délit* in the sense of the local Penal Code. The point was raised and formally determined in the case of *Alexandre*.

His Honor the Chief Judge : The point must surely have occurred before. I shall take an opportunity of conferring with my brethren before I dispose of it.

His Honor on his return into Court said : I have now had an opportunity of mentioning the matter to my brother, Mr Justice Beatel, who is at chambers to day. I find from the Report of the Registrar of the Court,that the practice has invariably been not to furnish a list of witnesses and papers, as is done when parties are tried, at the Assizes for crimes. The practice is not disputed, but it is said to be a *mala praxis* which *Est Abolenda*. But it must be observed that the words of Criminal Procedure Ordinance, and ordering the furnishing of those lists, are precise and limited: Cases of treason and felony alone are mentioned. At no period in this colony under whatever form of procedure, has it been the practice, in the cases of *delits* or misdemeanors, to furnish lists of witnesses and documents. Without then alluding to the argument that the motion in any view is too late we think it proper to decide the matter on its merits, that the profession may have a guid for the future,and the motion must be refused.

The evidence, in the case, was then proceeded with, and was of the following description :

Suspicions being entertained that the revenue was defrauded at the "Usine Centrale," a large distillery near Mahébourg, the Police were on the watch during the night between the 22nd and 23rd of February last. Two Superior Officiers, Inspectors Shellam and Bell, were stationned about 120 yards from the distillery, and 3 constables, at a considerably less distance, in another direction and within 30 or 40 yards of the small dwelling house, occupied by Robert, one of the parties now accused, and who was in charge of the distillery. The distance between the distillery and Robert's house was about 70 yards; all the Police were under a covet. The Inspectors deposed that, about 1 o'clock in the morning, they went to a small hole, about 4 inches square, apparently of old standing, which they had detected in the outer back wall of the premises, a few feet above the ground, and that about 18 inches or so within this aperture they felt the end of an open pipe of somewhat less than an inch bore.

These officiers further deposed that a little, before 6 o'clock, they observed an Indian(the accused Madhub) mount up on the wall of the fermenting citerns, which are within a few feet of the back wall of the distillery, and after looking around him for a few minutes gradually move 2 wooden buckets, till the

were opposite the aperture. In the same time the distillery was opened for the work of the day, the witnesses believe, by the Inspector Hill, who keeps the keys, and who then arrived at the Distillery. Another Inspector Sevelé, was also present. He had been previously in charge, and was there on the morning in question, voluntarily, for the purpose of filling up some permits.

Robert, the accused, arrived, a few moments after the Inspectors, from his house, and appears to have been, for some time, seated, reading a newspaper, near a sidedoor of the premises. Some minutes after the distillery was opened, the Police Inspector saw several Indians go rapidly round to the back of the Distillery, from the front which faces the sea. One of them, in light dress, received from the Indian on the wall, one of the buckets apparently empty, and immediately introducing a white pipe into the aperture in the wall, and placing the bucket below it, a liquid was seen to flow into the vessel. When it appeared to be full, the Indian took it up, handed it to Madhub, who passed it over the washvats to an Indian, on the other side, who immediately set off, and carried it to the house of Robert. In the meantime the Indian on the wall of the washvats, handed another bucket to the Indian standing by the pipe, and the same operation was repeated with the second bucket.

As soon as the two officers saw the 2nd bucket reach Robert's house, they rushed from their place of concealment, Bell to the hole in the outside, William to the inside of the Distillery. At the same time, the constables, by preconcerted arrangement, ran straight to Roberts' house. Immediately on the officers starting up, the alarm of Police was given, and having to go round by a bridge, Shellam and Bell took some time to arrive at the distillery.

The Indian with the white pipe, ran off and has never been since heard off. Bell, on reaching the aperture in the wall, found the pipe within the wall quite moist with fresh rum; Shellam, when near the front door of the distillery, met Robert who asked "what is the matter?" Shellam answered: "we shall see that by and bye," and rushed into the distillery. Robert then cried out to the Indian on the wall, to throw the buckets into the fermenting vats and *de faire attention*. Both buckets were thrown into the vats, one of them by the accused Tandrayen, who was the person who carried it.

On entering the distillery, Shellam found that Hill had gone into the store room, where it appears, he had been for some minutes gauging the rum. Levelé was sitting writing at the Inspector's table, and the two persons against whom the charge was not pressed, were found, with the Indian Hussanee, near the jug, where the spirits are received, at the end of the worm of the still fronting, and at some 15 feet distance from the Inspectors' chair. This tube is opposite the hole in the back wall and about 8 feet from the wall which is itself from 2 to 3 feet thick. Shellam found the pipe, the outer orifice of which he and Bell had felt over night, imbedded in earth in the inside of the distillery, the inner and higher end, with a stopper in it, about 4 feet from the termination of the worm from which the rum dropped into the receiving tube. The pipe smelt of fresh rum, and the ground, at its inner end was saturated with rum. The pipe was produced in Court. Owing to the presence of a piedestal built in masonry of 4 feet in thickness, between the worm and the pipe found in the earth, to establish a direct connection between them, a pipe or conduit of a particular shape or bend would have been required. Nothing of the kind was found. Several jugs or measures of different sizes (the largest holding a gallon) were found near the worm, and the accused Narainen was engaged in emptying the cask or tube, which was about ½ or 1|5 full of rum, and was of the capacity of 35 or 40 gallons.

The buckets were taken out of the washvats. It did not appear that they then smell of rum. The washvats themselves were emptied the next day, Nothing suspicious was found in them.

When the Police went into Robert's house, they found in a bedroom, a wooden water tube, with 3|4 gallons of rum in it. The rum was tasted by Hill, and found to correspond exactly with the rum running from the worm; the strength was 24½. Bell deposed that both the rum flowing from the worm, and that found in Robert's house was tepid, that each of the buckets held about 4 gallons; that he saw no preparations in Robert's house for a bath, that he saw a tin bath, lying on its side, with jars and pots in it.

The evidence of Madhub, the accomplice, was generally quite corroborative of the statements of the Police; he stated that his station in the distillery was at the fermenting vats, and that when the fermentation did not go on well, some of the residue was in use to be taken from the front of the distillery where it flowed off into the vat; that it was his business to attend this, and also, in Robert's absence, to fire notice, when the wash was ready for the still. This witness said that he had seen the same thing done (carrying of liquid in buckets from the aperture in the wall of the Distillery) twice before, "when there was time;" that he never heard Robert give orders to do it, and that Robert's words, the morning when the Police came to the Distillery, were "to stop and pay attention *faire attention*. It was given in evidence, by the Crown, that rum, kept for 18 months or so, would probably lose 2 or 3 degrees of strength.

On the part of the defence it was sworn by Sévelie that he was in the Distillery when the Police arrived, though his term of duty had then expired; that he was sitting in the Inspector's chair, writing permits, while Hill was absent, in the store room. That he saw no rum illegally drawn off, at the worm, though he was within some 3 yards or so of it; that there was rum running from the still, at the time, as the furnace had been lighted, as usual an hour or two, before the opening of the distillery; that there were no funnels in the distillery which could have been used for finding the secret pipe;—that the rum sometimes runs tepid from such a still, but that it is an accident arising from bad management.

One of the two parties, originally charged with the offence, but against whom the case was abandoned, was called for the defence, and deposed that he had been sent to the distillery, by the proprietors, to act as accountant, and to represent them on the spot; that Robert had told him in conversation, that he had a pipe, (*j'ai mon tuyau*); but that the witness thought he was joking, till he saw the pipe discovered, on the morning in question, when he remembered what Robert had said.

A female, who had long lived with Robert on very intimate terms, deposed that he had got a large cask of rum in 1859, that latterly, as the cask which stood in the bed room was found to be inconvenient and a considerable quantity of the rum had been used, the remainder, was in the beginning of the year, emptied by Robert, with the assistance of one Minet, into a wooden water tub, and placed in her bed room, and that was the tub which the Police had found in Robert's house. That it was full to within 4 or 6 inches of the top; that the morning before the Police arrived, an Indian, who is a general house servant, and has no duties positively fixed had brought 4 buckets of the residuum, from the distillery, to be mixed with an equal quantity of hot water, to make a bath, which she was in the habit of frequently taking;—that no rum came to the house that day;—that she had just left the bath when the Police arrived, and merely time to put on her dressing gown;—that the bath she used was the only one in the house, that there was no other bath with jars &a. lying in it.

This witness spoke to the extravagant conduct of the witness Madhub, when in jail, whither she had gone to see him, evidencing, in her opinion, that he had lost his senses.

MINET was examined and confirmed the preceding witness's statements as to emptying the rum, from the cask, into the water tub.

The manufacturer of the still, used at the "Usine centrale" was called, and stated that rum could only be produced by accident, in such a large still, if the furnaces had been lighted only for 1or 1 1/2 hour; that if the rum ran tepid this must also have arisen from accident, and bad management.

A permit to Robert to remove a 50 gallons cask of rum, of the strength of 26° O. dated 14th May 1859, was put in by him.

L. ROUILLARD for Tandrayen, Narainen and Hussanee, argued: There is no evidence what ever, against any of the three except Narainen, and the only evidence against him is from an accomplice. This is insufficient (ARCHBOLD, p. 226,) These Indians, even if they had participated in the offence, were mere servants, acting in obedience to orders from their master;—they get no personal advantage, and they cannot be supposed to know any thing of the law of the Colony, on such subjects.

G. B. COLIN, for Robert: The position of my client is a hard one; he has been ruined by the result of certain law writs; he is now cast off by his employers, and being a foreigner, it is wished to get quit of him altogether. The first charge is that Robert "*aided and abetted*" the Indians. This is what the Crown has undertaken to prove. But this implies, in the first place, that the contravention was committed by the Indians. This has not been established. By the theory of the Crown, two pipes, in addition to the one now on the table, must have been required. Yet not one is produced. There was plenty of time to have secured, at least, one of the buckets, this was not done; and it has not been shewn that they even smelt of rum, or were seen to enter Robert's house. The notion of one of the witnesses, that the rum found in the distillery and in Robert's house was tepid, and of equal temperature is absurd; rum coming from the still is quite cold, it could only get heated by radiation and very bad management.

But even if the Contravention had been against the Indians, there was no *aiding and abetting* by Robert; he was sitting quietly reading a newspaper. It is said he spoke to one of the Indians, and told him to pay attention. But this was quite natural. That Indian was actually performing important duties, at the fermenting vat, and it was necessary to give him such orders. If Madhub was the right hand man of Robert, in the perpetration of the fraud, he must have known of the pipe, but he says he did not know it was there, and only saw the thing done twice. The witnesses, on one side, are all interested; on the other, they are speaking against their interest.

Then to as the Count, against Robert, of having rum in his possession illegally, it has not been established, even if the buckets entered his house; there was on rum in them, mere-

ly residuum which was used for a bath, and before Shellam arrived at Robert's house, there was ample time for the female witness to dress, after her bath, as she stated, seeing the constables did not go into Robert's house, till the Police Inspectors arrived there. Then the rum in the house is honestly accounted for. If Robert, who is a very shrewd person, had intended any fraud, he would have had a new Permit, and would never have relied on one of 1859. The fact of the rum having been poured from the cask is completely established by the witnesses; again, on the whole case, if Sévelie, the Government Official, is to be believed, there could not have been a contravention as he was within a few yards of the worm, the whole time, and must have seen every thing that was done.

Even if there were suspicions against Robert it is not enough, the Crown must prove his guilt.

Douglas answered: the burden of proof does not lie on the Crown. If the rum was illegally removed the person on whose premises it is found must prove his innocence. From the incessant frauds practised on the revenue, this stringent rule, contrary to the common law, has been found necessary.—The present case has been clearly proved. The Inspectors saw the rum go into Robert's house. It is immediately searched and the only liquid found in the house was rum, precisely corresponding with the rum running from the still, in strength and in quantity, with what the 2 buckets held.

It is asked, what became of the connecting pipes? The answer is obvious. The Indian who carried off the outside one escaped. There was ample time to carry the inside one out at the front door, and threw it in the sea which is within a few yards of the door. It is a mistake to say that there was a Government Inspector looking on all the time. Hill the Inspector was in the store room, and Sévelie was out of employment of *Government*, and it is not likely he will ever be employed again.

The story of the female witness is altogether incredible. Five minutes did not elapse till Robert's house was searched by the Police, and rum *permitted* in 1859, must have lost its strength. The story of emptying the remaining of the rum into the water tub may be quite true, and yet Robert be guilty of all that he is now charged with. The evidence of the accomplice Madhub is corroborated by the other witnesses in all particulars.

JUDGMENT.

This trial has occupied two days and the case has been argued with more than usual anxiety. If the evidence of the two Inspectors of Police is to be believed, there seems little reason to doubt that a quantity of rum was illegally carried off, in buckets, from the *Usine Centrale* on the morning in question.

Their statements as to all that they saw, or could see in common, are quite consistent, and under the eye of vigilant and experienced Counsel nothing was elicited, in cross examination, seriously to affect their evidence.

No doubt, they saw things with the eyes of Police men, and as they may share in the penalties, if any are inflicted, it is perfectly reasonable to argue as has been strongly done, that they are not altogether free and unbiassed witnesses. But making every fair and reasonable allowance for these peculiarities of profession or position, enough remains to satisfy the Court that the contravention was committed, on the morning in question. The Court would feel itself obliged to arrive at this conclusion, even if it had not the evidence of Madhub.

To the statements of an accomplice, more particularly when placed in the peculiar situation of this witness, and standing alone and unconfirmed by other and better evidence, a Court of Justice would pay but little attention, but his evidence is in law admissible, and unquestionably it agrees with the statements of the other witnesses. It is not therefore to be altogether thrown aside.

Two difficulties, in the way of arriving at a conclusion of guilt, have been urged, by the Counsel for Robert. In the *first* place it is said, if the Crown witnesses, story were true, there must have been a pipe added on the inside, of a considerable length and peculiar shape. Nothing of the sort was seen and there was no opportunity of concealing it. Now it is not absolutely necessary to assume the existence of any such pipe at all. The ground at the inside end of the pipe, found concealed in the earth, was saturated with rum. It is quite possible that the rum which, it is proved, existed in abundance in the receiving tub was poured from one of the 4 jugs standing at the place, directly into the orifice of the pipe, at the sacrifice, no doubt, of part of the rum; but this might account for the saturation of the neighbouring floor. Besides, even if a connecting pipe had been used, it is proved that some interval elapsed between the alarm being given, that the Police were coming, and their arrival, and Robert is proved to have been then outside of the distillery and close to the sea.

The *second* difficulty was this: How could the rum have been put into the pipe while *Sévelie* was quite close to the spot, and saw nothing of the kind. Now *Sévelie* was seated about 6 yards from the worm, and engaged in writing out permits. Without charging him with wilful blindness, there is nothing impossible in supposing that the party or parties

engaged in emptying the rum, at the worm, should have put a part of the liquid into the pipe, the orifice of which was so near the worm, without his having perceived it.

The quantity of rum found in the house corresponded exactly with what the two buckets held, in quality and strength; it was identical with the new rum running at the worm. Had it been the remains of the old rum permitted in 1859, its strength could not have been so great.

The Court regrets to be obliged to reject the evidence of the female witness, in all its more important particulars. Her position, in this case, is in various respect a painful one. What she and the witness *Minet* say about the rum cask being emptied, in the beginning of the year, may be perfectly true, without affecting the result of the present inquiry, but her other statements are in contradiction to facts which the Court finds itself compelled to credit.

But it remains to inquire: Is it proved that Robert "aid and abet" in this fraud on the Revenue. The Court is of opinion that this is also established: The rum was carried direct to his house, by the Indians employed under him, and put in his tub. When the Police arrived he called to these Indians to throw the buckets in the washvats, a dexterous move, but one exceedingly difficult to reconcile with innocence. And he had formerly been in the habit of boasting *that he had his pipe*, to say the least, a very singular manner of speaking; but the Court is not inclined to attach much importance to this fact.

In the view of the evidence which the Court takes, it must also find the second Count, as far as concerns Robert, proved.

Tandrayen was sworn to, by Inspector Shellam, as the Indian who threw the first of the two buckets in the fermenting vats. Madhub also spoke to being one of the Indians who carried the rum.

The same witness also states that the accused Narainen was one of the parties active in the matter, and that the remaining prisoner, Hussaneee, was the Indian engaged at the receiving tub, in the inside. This sort of evidence will not do. It is only against the first of these persons, viz: Tandrayen, that the Court finds sufficient proof for conviction.

By the late Ord. of 1861 (No. 8) the Court is authorized to add, when it thinks proper, the punishment of imprisonment to fine. This Ordinance proceeds on the preamble that: "the law for regulating the distillation, and compounding of spirits, in this Colony, is defective in several particulars, in consequence of which the Government is frequently defrauded, with impunity, of the duties on such spirits, and that it is expedient to make temporary provisions for preventing such frauds, pending the consideration of measures of a more permanent character."

In awarding a punishment, the Court cannot overlook the declarations of the legislature. The sentence of the Court is that the prisoner Robert, on the second Count, be fined, the sum of £ 50 and be imprisoned for 14 days, and on the third, Count that he be fined the further sum of £50, and be imprisoned for the further period of 14 days; that, on the first Count, the prisoner Tandrayen, who has already been in jail for a considerable period, be fined the sum of £25 sterling, and be imprisoned for the period of 14 days. That the other prisoners be discharged.

If the fines awarded against the accused Robert, are not paid within one calendar month, the Court awards the further imprisonment of 3 calendar months. If Tandrayen do not pay his fine, within one calendar month, the Court awards against him one calendar month further imprisonment.

Further the Court declares the rum found in Robert's House to be forfeited to the Crown.

Supreme Court.

NAVIRE,—CAPITAINE ET PROPRIÉTAIRES — FOURNITURES FAITES AU CAPITAINE,—FORME DE LA DEMANDE EN REMBOURSEMENT,—TRAITÉ DE ABBOT SUR LA NAVIGATION,—CODE DE COMMERCE. ART. 232.

Celui qui a vendu des fournitures au Capitaine d'un navire, dont les propriétaires se trouvaient sur les lieux, a droit d'en réclamer le prix à ces derniers, lorsqu'il peut prouver que ces fournitures ont été vendues pour l'usage du navire. L'Article 232 du Code de Commerce ne s'applique qu'aux rapports entre Capitaines et commettants.

Les co-propriétaires du navire étant débiteurs soldidaires des avances qui lui ont été faites, la demande peut être dirigée contre eux, où contre chacun d'entre eux pour la totalité, sans égard à leurs parts et portions respectives dans l'entreprise.

SHIP,— CAPTAIN AND OWNERS,— FURNITURES MADE TO THE CAPTAIN,—FORM OF DECLARATION,—ABBOT ON SHIPPING,—CODE DE COMMERCE. ART. 232.

The seller of furnitures to the Captain of a ship, whereof the owners reside in the same place, is entitled to claim the price thereof to the said owners, after proving that the said furnitures have been purchased for the use of the ship. Art. 232 of the Code de Commerce applies only to dealings between Captain and Owners.

The co-owners of a ship being joint debtors of the advances made to the said ship, the payment thereof may be claimed from them, or each of them, for the full amount, without regard to their share and portion in the said ship.

Number of Record: 7774.

RHOODS & THOMPSON, Plaintiffs.
Versus.
SABOO SIDICK & Others, Defendants.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL, 2. P. J.

J. ROUILLARD,—Of Counsel for Plaintiffs.
E. DE ST. PERNE,—Plaintiffs' Attorney
S. J. DOUGLAS—Of Counsel for Defendants.
J. H. SLADE,—Defendants' Attorney.

24th July 1862.

In this suit, the Plaintiffs seek to recover, from the Defendants, the owners of the ship hereinafter mentioned, the sum of $ 750,25 ¢ for "various goods supplied by them, for the "use of the ship *Fatel Monbarrach*, from the "first of October up to the fourth December "1861," and set forth in an account approved as correct and signed by Charles Lablache, the master of the said vessel, Interest at 12 per-cent, Costs and arrest in execution are also prayed for.

The demand was met: First, by a denial of the alleged supplies having been made; Secondly, it was argued that, assuming the supplies to have been made to the master, for the use of the ship, however, the owners were not liable, the captain being without authority to order such supplies, owing to the presence, on the spot, of the owners of the vessel. (See ABBOTT on Shipping. Page 98, 10th Edition, by Shee. 1854).

That assuming the rights of a Master to bind his owners, it is required of Plaintiffs that they should prove the articles supplied to have been necessary for the use of the ship. (See same author. Page 99. 14.)

That assuming proof made of the various requisites above set forth, the demand should have set forth the respective shares of the several owners, in the ship, in order to entitle them to recover against all the owners, which not being the case, in this instance, the Plaintiffs are not *recti in curid* and must therefore be nonsuited.

The reply to these arguments was that any one pledging his credit for supplies, to any ship, was liable for such supplies. That the master, notwithstanding the presence of one of the owners of the ship, on the spot, had sufficient authority to order necessaries for the ship and bind the owners. (See PARDESSUS. Droit Comm. Volume 3 page 630.)

JUDGMENT.

On reference to the evidence, we find that the supplies, of which the price is demanded, have been made to the Master of the vessel; that those supplies were more or less necessary for the use of the ship *Fatel Monbarrach*, from the first October to fourth December 1861. A part of those necessaries were supplied, before the order given to Plaintiffs by Saboo Sidick, one of the co-owners of the said vessel, whence it has been argued, by the Defendants, that the owners could be liable, (if at all) but for that part only of the debt contracted by the co-owners of the vessel, thro' the medium of one of them, from the beginning of, down to the 4th November 1861, for the evidence shews that the visit of Saboo Sidick with Lablache occured in November only.

This argument necessarily implies that the master, at the place of residence of the owners, was without authority to bind the owners, if true it be, that the latter are liable only for the amount of the articles supplied in November last, the date of Saboo Sidick's visit at Plaintiffs' store. The authority quoted, in support of that argument, appear, to a certain extent, to militate against it.

As to the *personal* obligation of the owners (says Abbot, under the head of "Masters' authority as to repairs and necessaries," Page 98.) "I have already stated the nature and "grounds of the owner's obligations, in the "case of contracts made by the master, "for the carriage of merchandize in their "ship. Their obligation, in the case of "his contracts now under consideration, is of "the same nature, and depends upon the "same principles; for as those relate to the "employment of the ship, so these relate to "the means of employing it; and accordingly "we find the obligation of the owners, in "both cases, laid down in the very same parts "of the Civil Law, and treated under one head. "And as the master in general appears, to "all the world, as the agent of the owners, in "matters relating to the usual employment "of the ship, so does he also, in matters relating to the *means* of employing the ship; the "business of fitting out, victualling and "manning the ship being left *wholly* to his "management, in place *where* the *owners do* "*not reside*, and have no established agent, "*also even in the place of their own residence.*"

If we turn to Article 232 of the COMMERCIAL CODE of the Colony we read:

"Le Capitaine, dans le lieu de la demeure "des propriétaires ou de leurs fondés de pou-"voir, ne peut, sans leur autorisation spéciale, "faire travailler au radoub du bâtiment, "acheter des voiles, cordages et autres choses "pour le bâtiment, prendre à cette effet de "l'argent sur le corps du navire, ni frèter le "navire."

In his comment of this article, PARDESSUS thus expresses himself.

" Lorsque l'armateur est absent, et n'a pas " pris la précaution de donner ses pouvoirs à " quelqu'un, il est présumé s'en être rapporté " au Capitaine et l'avoir autorisé à faire les " dépenses qu'il jugerait nécessaires, même " dans le lieu de l'embarquement et avant le " voyage commencé.

" Du reste cette distinction n'est impor- " tante que dans les rapports du capitaine et " de son commettant : *quant aux personnes* " *avec qui il aurait traité*, l'engagement *n'en* " *est pas moins valable*, puisque la *nature* de " ses fonctions prouve qu'il a *le droit* de les " souscrire, et que, d'un autre côté, la *présence* " *du commettant* ou *l'existence de son fondé de* " *pouvoir*, sur le lieu, ne peut toujours être " assez connue de ces tiers, pour qu'ils soient " réputés en mauvaise foi." *Droit Comm.* Third Edition, of 1825. P. P. 14 and 15. And the reason of this is the same in the English and the Colonial Law as expounded by ABBOTT and PARDESSUS.

We have heard the reason of the French Commentator, and the following are those of Lord TENDERDEN :

" His character and situation (the Master's) " furnish *presumptive evidence* of authority, " from the owners, to act for them in the " cases, *liable indeed to be rebutted* by proof " that they, or some other person, for them, " managed the concern in any particular " instance, and that this fact was actually " known to a *particular* creditor, or was of " such general notoriety that he cannot " be supposed to be, because he ought not " to have been, ignorant of it, or that " they were, by the terms of the con- " tract, expressly excluded. (ABBOTT on Ship- " ping. Same Ed. page 98. end of Section. 2." None of which hypothesis is to be met within this case. Hence, upon the strength of the authorities cited, it necessarily follows that the Master had, under the circumstances of this case, authority to bind the owners of the ship.

The objection that the demand is bad, for not having set out the number of the shares of the Defendants respectively, is easily removed by the fact that there is no enactment, in our Code of Commerce or of the Code of Procedure Civile, requiring that the Declaration against one or more, or the whole, of the owners, should set out the interest or share of the several Defendants in the vessel.

On reference to CHITTY's froms of Declaration, against the owner of a vessel, no distinction is suggested as necessary, when the action is brought against more owners than one.

On reference to ABBOTT on Shipping (same Edition, Page 80.) we read that, " if an action " be brought against the part owners, upon " any contract relating to the ship, although " regularly such action should be brought " against all jointly, yet if all are not sued, the " Defendants can only avail themselves of the " objection, by plea in abatment, upon which " it would be ordered that the several co ow " ners should be made joint Defendants with " the owner sued." (But such an order however would be superfluous, in this case, as there are only two owners, and both have been made Defendants) " And if they omit to plead such a plea, " the Plaintiff will recover his whole demand, " and the Defendant must afterwards call " upon the others for contribution. "—And farther, Page 81 : " If a tradesman, who has " repaired a ship, takes from some of the part " owners, sums equivalent to their shares, " they will remain responsible for the resi- " due, if not paid by the others, unless at time " of payment the tradesman specially agree to " discharge them from all further demand, " upon some good consideration inducing him " so to do, such as payment before the expira- " tion of the usual credit ; or release them " by deed, which no prudent man will do with- " out some very strong inducement. In this " respect, the law of England differs from the " civil law, which gives an action against any " one, part owner, upon a contract made by " the master, to the full extent of the demand, " but, in the case of contracts made by the part " owners themselves, holds each to be char- " geable only in proportion to his own share " of the ship."

Judgment therefore for Plaintiffs. Interest at twelve per cent. Arrest in execution. Imprisonment not to exceed three years, and costs of suit.

Supreme Court.

PREUVE TESTIMONIALE EN MATIÈRE DE DOMMAGES ET INTÉRÊTS.

ORAL PROOF IN MATTER OF DAMAGES.

Number of Record : 5780.

GALLANTY and WIFE, Plaintiffs.
versus
PELLEGRIN, Defendant.

Before :
The Hon. SIR J. E. RÉMONO, 1st P. J. and
The Hon. N. G. BESTEL, 2nd P. J.

G. B. COLIN,—Of Counsel for Plaintiffs.
Plaintiffs' Attorney.
A. LEGALL,—Of Counsel for Defendant.
J. H. ACKROYD,—Defendant's Attorney.

24th July 1862.

This is a case wherein the Plaintiffs claim from the Defendant the sum of £ 12,000, for certain damages alleged to have been sustain-

ed by them, from the breach of a certain agreement, under private signatures, entered into between themselves, William Frédéric Bonnefin and Clément Joseph Bonnefin,, on the 27th Sept. 1859, for several purposes in the said agreement setforth ; which agreement is, by the Plaintiffs, alleged to be binding on the Defendant Pellegrin, as having succeeded to the said Bonnefin, by purchase of the Estate *Bonne Terre* in the District of Plaines Wilhems.

On the calling of the cause for trial, CORIN having opened the case for the Plaintiffs, was about examining his witnesses, in support of the several facts in the Declaration setforth, when LEGALL, for the Defendant, objected to the oral evidence tendered by COLIN.

Parties were fully heard on this preliminary point, and the Court is now called upon to decide whether the oral evidence tendered be or be not admissible.

JUDGMENT.

Amongst the facts sought to be proved are the following, viz : that, in pursuance of the agreement with Bonnefin Brothers, the Plaintiffs, with their consent, took possession of a certain number of acres of land and planted the same with sugar canes, before the sale, of the Estate at the bar.

It is clear that, in order to assess the damages claimed, if any, it is absolutely necessary that the existence of the facts, giving rise to the wrongs alleged to have been sustained, should be proved ; without which the Plaintiffs must fail.

Whether, upon such proof, the Defendant is to be liable for the wrongs imputed to him, is a fit point for after discussion and consideration.

It is therefore considered by the Court here, that the parole evidence tendered be proceeded with.

Costs reserved.

Bail Court.

APPEL D'UN JUGEMENT DU MAGISTRAT DE DISTICT,—ORDONNANCE No. 35 DE 1853.

Il n'est pas nécessaire que l'acte d'accusation porte, en outre du jour, l'heure à laquelle le délit a été commis.

L'Appel ne doit porter que sur des points de droit.

Un avocat peut il souscrire un acte d'Appel?

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE,—ORDINANCE No. 35 OF 1852.

The hour of the day does not require to be stated in the Information under pain of nullity.

Appeal lies only on points of law.

Can the Appeal be competently subscribed by Counsel?

Number of Record : 145

RAMGOOLAM, Appellant.

versus.

THE QUEEN, Respondent.

Before :

His Honor the CHIEF JUDGE.

A. LALOUETTE—Of Counsel for Appellant.
V. LAVAL,—Appellant's Attorney.
S. J. DOUGLAS,—Of Counsel for Respondent
J. BOUCHET,—Respondent's Attorney.

24th July 1862.

This was an Appeal from the Judgment of the District Magistrate of Pamplemousses, sitting on the criminal side. The Appellant was charged with having committed, on the 10th March last, a larceny, from one Appajee, residing on "*Les Rochers*" Estate, of a collar composed of three sovereigns, of one silver wrist bangle, and of one silver chain, the property of the said Appajee.

The Appellant was convicted, on evidence which satisfied the learned Judge below, and sentenced, under Article 310 of the Penal Code, to six months imprisonment, to pay the sum of 18s. of costs, and, in default of payment of the said sum, to three days further imprisonment.

Ramgoolam appealed.

DOUGLAS, Substitute Procureur General, took a preliminary objection to the regularity of the Appeal, namely : that it was not subscribed by the Appellant himself, in terms of the Ordinance No. 32 of 1852, but merely by a learned advocate of this Court.

LALOUETTE answered that the practice followed in this case was the usual and customary one.

THE CROWN did not press the objection, but gave warning that if the thing occurred again, the point would be followed up. For the Appellant it was, *inter alia*, contended that the Information was irregular, in not mentioning the hour of the day, at which the larceny was alleged to have taken place ; that this was material for the defence ; that the Schedule in the Ord., regulating the form of the Information, mentioned the hour ; and the case of *Rama vs. The Queen* (Piston's Reports. Volume 1. Page 219.) was referred to. Further it was argued that the evidence of guilt was insufficient to sustain the Conviction.

DOUGLAS, *for the Crown*. The only point which requires any answer, is the allegation of

the want of the hour in the Information. The case relied on has no application, as there, not even the day was mentioned, while here the complaint is merely that the particular hour of the day is not stated. The hour may be stated, but there is no necessity that it should be so.

His Honor the Chief Judge: The evidence appears quite sufficient to sustain the Conviction, but in these Appeals the Supreme Court has to deal with points of law only. The Schedule regulating the general form of the Informations, for what reason I know not, mentions a special hour of the day. If the Prosecutor chooses to give a special hour, well and good, but he could never be compelled to tie himself down so rigidly, under pain of nullity. If the time is of the essence of the defence, as it often may well be, then the Court will cause the Prosecutor, during the trial, to be very precise in his proof of that part of his case. The case of *Rama* was quite different from the present.

Appeal dismissed with costs.

Supreme Court.

Arbitres,—Tiers arbitres,—Homologation du Procès Verbal d'expertise,—Compétence et attributions du Tiers Arbitre,—Art. 1018 Code de Proc. Civ.

Arbitrators,—Third Arbitrator,—Homologation of Memorandum of Arbitration,—Jurisdiction and attributions of the Third Arbitrator—Art. 1018 Code of Civ. Proc.

Number of Record: 7150

[illegible] Plaintiff

[illegible] Defendants.

The Honorable Sir [illegible] C.J. and The Honorable [illegible] P.J.

A Legall,—of Counsel for Plaintiff.
P. E. de Chazal,—Plaintiff's Attorney.
L Arnaud,—of Counsel for Defendants.
V, Laval,—Defendants' Attorney.

24th July 1862.

The motion made in this case, by Legall, on behalf of Plaintiff, was to make absolute a Rule Nisi calling upon Defendant to shew cause why the Award of arbitration, made in this matter, by Jacques Bourdin, on the tenth October 1859, should not be executed according to its from and tenor, with costs against the Defendant.

The Rule of reference was made by consent, and the subject matter of the reference was: "All matters in the cause then pending before the Court," with power to the arbitrators, named by the respective parties, to appoint any third person, as umpire, in case of need.

Arnaud, in shewing cause, objected to the issuing of the "*Exequatur*" moved for, on several grounds, the main of which, however, was the want of compliance with the following provision of Article 1018 of the Code of Civil Procedure, 2d. Section: "Si tous les arbitres "ne se réunissent pas, le tiers arbitre se pro- "noncera seul; et néanmoins il sera tenu de- "se conformer à l'un des avis des autres "arbitres." And that the "Tiers arbitre," bound as he was, to elect between the contending opinions of the two arbitrators, was, in law, bound to adopt the whole opinion of one of the arbitrators only, and not a part of the opinion of one and part of the opinion of the other Arbitrator, as has been done by the umpire in this case.

The objection is no novelty, as may be ascertained on reference to the work of Carré. Proc. Civ. 3rd. Volume, Question 3347, namely; "Est-il loisible au tiers arbitre de prendre "de chaque opinion, ce qui lui semble devoir "former le fondement de sa décision?

"Nous fondons l'affirmative de cette ques- "tion sur la grande règle d'interprétation "consacrée par le droit romain. *Etsi verba "legis hunc habeant intellectum tamen mens "legislatoris aliud vult.*

"Le tribunal demandait, dit Mr. Locré, "comment s'exécuterait la règle qui prescrit "au tiers arbitre de se conformer à l'avis de "l'un des deux premiers arbitres. Faudrait-il "que cette conformité s'établit sur le résultat "pris *en masse*, ou bien le tiers arbitre pour- "rait-il adopter l'avis d'un des premiers arbi- "tres, sur *un point seulement*, pour adopter "l'avis de l'autre *sur un autre point*, de manière "que sa décision, étant toujours conforme "dans les détails, à l'opinion, soit de l'un, "soit de l'autre, il arrivat cependant que, dans "la récapitulation générale, *elle différat de "toutes deux*?

"Le tribunal pensait que ce dernier seule- "ment devait prévaloir, surtout dans l'arbi- "trage légal ou forcé..... Cette "opinion, ajoute Mr. Locré, est tellement "certaine qu'on n'a pas cru devoir l'exprimer "dans le Code."

The main objection against the *Exequatur* prayed for is therefore overruled.

The other objections, resting on the excess of power complained of, arising from the Arbitrators having awarded arrest in execution not demanded, and absence of award on all matters in dispute, may be easily disposed of, on reference to the terms of the Rule of reference in the case.

The matters referred to are: "all matters pending in the cause."

The Arbitrators were therefore deputed to enquire into the merits of the whole cause, and to adjudicate thereupon as the Court would have done, had not the cause been withdrawn from its cognizance, by the reference made, by consent, by the parties.

In adjudicating on the case, the Court would have to adjudicate on the whole case, not only as to its merits, but on the mode and

form of enforcing execution of its Judgment, and also on the costs.

The Arbitrators having done no more than what the Court should have had to do, their award must therefore be, and is accordingly upholden by the Court.

The *exequatur* moved for is therefore granted, with costs against Defendants.

Bankruptcy Court.

CONCORDAT,—FAILLITE.—ORD. No. 33 DE 1853.

Circonstances en vertu desquelles une société ayant proposé un concordat à ses créanciers, la Cour, sur le refus des créanciers, a déclaré la Société en Faillite.

ARRANGEMENT,—BANKRUPTCY,—ORD. No. 33 OF 1853.

Circumstances in which a proposed Arrangement having failed, the Estate was put in Bankruptcy.

ARRANGEMENT.

L'ESTRANGE & Co.

Before:

His Honor the CHIEF JUDGE.

SLADE & BANKS,—Petitioners' Attornies.

28th July 1862.

The Court, on adjudicating Bankrupts the said Petitioners, said:

This is a Petition for an Arrangement under the control of the Court, filed as far back as 22nd October last. The Balance sheet, as sworn to by the Insolvents, on 3rd December, shews debts to the amount of $560.179.45. and an apparent excess of Liabilities, over Assets, of $27.837.82 c.

A motion was made to day, on behalf of the Insolvents, under Section 161 of the Ordinance, that the Court should approve of an Arrangement which, it was alleged, had been assented to by more than the statutory number of creditors, namely 3|5 of those who had proved debts to the amount of £10.

The motion was resisted by Mess H. Cutler son and Chambers, of Sheffield, on the ground that the statutory amount was not obtained. These parties appeared in the Balance Sheet, given in by the Insolvents, as creditors to the amount of $60.496,46; for that sum they lodged an affidavit of verity bearing: "the "present claim being proved, without in any "way admitting the truth or correctness of "the said amount, so borne in the Balance "Sheet of the said L'Estrange and Company, "under the most ample and express reserve, "on the part of the said Messrs H. Cutler "son and Chambers, of proving for all and "any further sum or sums that may be "found due to them, either at present "or hereafter, on the found settlement of "accounts, and on the receipt of further "accounts, and documents from England, and "also under the most express and ample "reserves, on the part of the said H. Cutler "son and Chambers, of all their rights to "claim and take all goods, property, bills or "other valuable securities, of what kind "soever, belonging to them, that may be in "the custody or possession of the said L'Estrange and Co., or any of the members of "the firm, or of any other person or persons. "and under the most express and ample "reserve of claiming payment, by priority "and preference to all other creditor or "creditors, upon the proceeds of such goods, "property, bills or other valuable securities, "in case it should turn out that the same "have been sold or in any way disposed of."

The case has been very often called in Court, but parties, from sickness and other causes, not being ready to proceed, at their mutual request, and on representations of the magnitude of the real claim of Messrs. H. Cutler son and Chambers, and the difficulty of ascertaining its merits, without a tedious investigation of Books, documents and figures, adjournments have been granted from time.

On 30th June last, these creditors, under similar reserves as before, lodged, supported by affidavit, "an additional claim" of $102,974.72 being, as they stated: "the "difference between the amount already "proved by them and the amount in which "the claimants are really the creditors of "L'Estrange and Co."

If the debt of the objecting creditors could be taken at $60.496, 46, the assent of the statutory number of creditors necessary for a private arrangement would have been obtained; but the position of matters is now entirely altered by the latter affidavit.

The delay, in this case, has already been very great; at the present moment the statutory amount and number of creditors, for a private Arrangement, does not exist, and parties are not able, or inclined, to make any admission to facilitate the progress of the cause in the way of arrangement. From the discrepancies apparently existing in the accounts, books and understanding of parties, from the totally opposite account which they give of the same transactions, no positive evidence on which a Court could proceed would be procurable, till the close of investigations which would occupy a long period of time, and after all the mere amount for which these creditors are to vote, in the question of private arrangement, would be ascertained. Nothing would be fixed but the mode of winding up the Estate. and that very possibly, even then, by going into bankruptcy.

Farther the repugnance thus shewn by some of the largest creditors, to assent to any voluntary arrangement,—lest they may thereby affect their claims against third parties, whom they hold liable as well as the Messrs. L'Estrange,—is not to be lost sight of.

The Insolvents will therefore be adjudged Bankrupts.

SUPREME COURT.

APPEL D'UN JUGEMENT DU MASTER.

PROCÉDURE,—EVIDENCE,—HYPOTHÈQUE,—MANDANT ET MANDATAIRE,—HOMOLOGATION DE LA DÉLIBÉRATION D'UN CONSEIL DE FAMILLE,—MINEUR ÉMANCIPÉ,—MINEUR ÉMANCIPÉ POUR FAIRE LE COMMERCE,—EXIGIBILITÉ DE LA DETTE,—RATIFICATION, APRÈS LA MAJORITÉ, DES ACTES PASSÉS EN MINORITÉ,—NULLITÉS ABSOLUE ET RELATIVE.

1o.—*En matière de contestations, entre les créanciers produisant à l'Ordre sur une expropriation forcée, la réclamation des créanciers opposants doit se faire par voie de demande incidente et non par demande principale.*

2o.—*Par la constitution de la Cour Suprême, à Maurice, un Juge en chambre a qualité pour homologuer la délibération d'un Conseil de famille.*

3o.—*Lorsqu'il sera prouvé que, malgré de sérieuses recherches, le titre original ne peut être retrouvé, il sera permis d'en prouver le contenu par des preuves secondaires.*

4o.—*Lorsque l'acte constitutif de l'hypothèque est régulier et formel, et fixe le montant de la dette, il n'est pas nécessaire, pour la validité de cet acte, qu'il en existe un premier, établissant, d'une manière formelle, l'existence de la dette.*

6o.—*En général tous les actes légaux qu'une personne peut passer, à moins qu'ils ne lui soient strictement personnels, peuvent être également passés par un mandataire de son choix ; et le pouvoir de passer de tels actes comprend celui de remplir toutes les formalités nécessaires pour en assurer l'exécution.*

6o.—*Lorsqu'un mineur émancipé donne pouvoir d'hypothéquer un immeuble, ce pouvoir comprend celui de réunir un Conseil de famille pour la validité de l'acte.*

7o.—*Quel effet produit la ratification, après majorité, d'un acte passé en minorité, relativement à un second acte, passé en majorité, avec un tiers, et avant la ratification du premier acte ?*

APPEAL FROM A JUDGMENT OF THE MASTER.

PROCESS, — EVIDENCE, — MORTGAGE, — PRINCIPAL AND AGENT,—HOMOLOGATIONS OF FAMILY COUNCILS,—EMANCIPATED MINOR,—EMANCIPATD MINOR IN TRADE,—EXIGIBILITY OF DEBT,—RATIFICATION, AFTER MAJORITY, OF DEEDS EXECUTED IN MINORITY,—ABSOLUTE AND RELATIVE NULLITIES.

1o.—*In all ordinary cases of discussions, as to the rank of mortgages, on the sale price of an Estate sold by levy, the objections of creditors are received as incidents, by way of exception, without the necessity of a separate action.*

2o.—*Since the institution of the Supreme Court of Mauritius, a Judge of that Court, sitting at Chambers, has authority to homologate the resolutions of a Family Council.*

3o.—*When it is proved that an original document cannot be found, after a thorough search, secondary evidence will be admitted to prove its contents.*

4o.—*When the deed of mortgage is regular and formal and sets forth the amount of the debt, a separate formal writing establishing the amount of the debt is not necessary.*

5o.—*Generally, all the lawful acts which a person may exercise, unless strictly personal to himself, he may authorize an attorney to do for him ; and power to do a lawful act will include power to perform all the details necessary for executing the business.*

6o.—*Where an emancipated minor gave authority to mortgage an Estate, this was held to include authority to the attorney to convene a Family Council to authorize the proceedings.*

7o.—*What is the effect of a ratification, after majority, of a deed, granted in minority, with reference to a deed, granted in majority, to a third party, but before the ratification ?*

NUMBER OF RECORDS: 7125 AND 7126.

ORIENTAL BANK CORPORATION,

Appellants.

VERSUS

DAVID BARCLAY CHAPMAN, OVEREND GURNEY AND ORS.

Respondents.

BEFORE

His Honor the CHIEF JUDGE, and
The Honorable N. G. BESTEL, 2nd P. J.

S. J DOUGLAS,—of Counsel for Appellants.
E. DUVIVIER,—Appellants' Attorney.

Hon: H. Kœnig,— } Of Counsel for Res-
G. B. Colin,— } pondents.

E. Ducray,— }
J. Pignéguy,— } Respondents' At-
A. J. Colin.— } tornies.

5th August 1862.

(See Vol. 1. Page 220.)

This was an Appeal from two judgments of the Master, dated 19th July 1861 and 27th February 1862, respectively, giving priority to the claim of the Respondents Overend Gurney & Co, Bill Brokers in London, over that of the Oriental Bank Corporation, in the Distribution of the sale price of the Estate "*Queen Victoria,*" in the District of Flacq, the property of the late Edward Chapman, Merchant in Mauritius, and sold, on 6th March 1860, to Charles Montocchio and others for the sum of of $ 380.500.

The pecuniary amount involved in the case is considerable, being nearly £ 70,000, and a number of questions have been very fully discussed, in the course of an argument which lasted several days, some of them, if not of great novelty, at least of considerable nicety and difficulty, having led to great diversity of opinion among authors of established reputation in France.

The facts disclosed by the evidence, and which appear material for the determination of the questions argued, may be stated as follows:

Edward Chapman, the principal partner of the firm of Edward Chapman and Co, Merchants in Mauritius, successors of the firm of Edward Chapman, Barclay & Co, merchants there, died in the Colony, on 24th June 1854. Besides the property of "*Queen Victoria,*" he was the owner of two other large and valuable sugar Estates, in the Island, named "*Woodford*" and "*Louisa,*" and of certain other subjects, real and personal. He left a widow, a son, George Henry James Mobery Chapman, a lieutenant in the army, and a daughter Mary Georgina Chapman. Both children were in minority. By his will and codicil thereto, executed shortly before his death, viz: on the third and sixth June 1854 respectively, he left his widow certain special provisions, and also his whole real and personal estate, of which he had, by law, the power of disposal. By the local Code, each child had an indefeasible right to one third of the father's whole Estate and effects. The widow was named executrix under the will.

On the 7th August 1854, Mrs. Chapman, by judicial act, in terms of Art. 477 of the Civil Code, emancipated the two minor children; both being above the age of fifteen years.

Next day, viz: 8th August 1854, at a meeting of a family Council, held before the Master of the Supreme Court, Mr. Sholto James Douglas, Substitute Procureur General of Mauritius, was appointed Curator to the emancipated minors. Mr. Chapman's brother-in-law, Mr. Atholl Burnett, had been associated with him as a partner of the firm of Edward Chapman & Co., though a formal deed of co-partnery was not executed between them, till a few days before Chapman's death.

On 11th August 1854, Atholl Burnet being about to leave the colony, appointed Robert Glaspole Lancaster, the Manager of the Oriental Bank, and George Rougier Lagane, Chief Clerk in the Mercantile Establishment of Edward Chapman & Co., (and in case of death or incapacity,) Alexander Campbell Macpherson, of Port Louis, merchant, his general and special attornies in the colony, with the most ample powers for the management of all his affairs, whether personal or connected with the firm of Edward Chapman & Co.

To this power the following parties intervened, and consented, for all their rights and interests, viz: the widow Mrs. Chapman, George Chapman, his sister Mary Chapman, and S. J. Douglas, as Curator for the two emancipated minors.

Mary Chapman, it may be here mentioned, died, on 1st September 1854, in minority. By the local law, her mother succeeded to one fourth of her property, her brother taking the remaining three fourths. Accordingly it was stated, by the Counsel for the Appellants, in his argument, that after Miss Chapman's death, the succession of Edward Chapman came to stand vested in his Widow for five twelfths and in his son for seven twelfths.

On 10th October 1854, the emancipated minor, George Chapman, being about to leave the colony, granted, as heir both of his late father and sister, and with the sanction of his Curator, a procuration, in favor of Mr. W. Hervey, of Port Louis, and (in his absence) James Edward Arbuthnot, conferring very ample powers for the management of his affairs, whether these should concern him personally, or the Estate of his father, or the firm of which his father was a Member jointly with Mr. Atholl Burnet, *i e* the firm of Edward Chapman & Co., which, as already stated, had succeeded and come in place of the former firm of Edward Chapman, Barclay & Co. Special power was given to grant or accept all mortgages, to consent to all cessions, transfers or subrogations, with or without guarantee, and to the inscription of all privileges or mortgages.

Of the same date, Mrs Chapman, in her own personal name, and in her different ca-

pacities, as executrix and legatee of her late husband, and as heiress of her daughter, granted to the same party (Wm. Hervey), a procuration similar to that given by her son.

On the 5th December 1854, widow Chapman and George Chapman, both represented by William Hervey, as aforesaid, with the Curator of the minor, presented, by their Attorney at law, Henry Hancock Terry, a Petition to the Master of this Court, setting forth :

" That at the time of the decease of the " late Honorable Edward Chapman he was " the head of a mercantile firm, and in part- " nership with Atholl Burnett Esquire, trad- " ing and carrying on business under the " style of Edward Chapman & Co.

" The operations of the firm were of con- " siderable importance, and its connection " very extensive, both in this Colony and in " England.

" That the surviving partner, Mr Atholl " Burnett, has left this Colony for England on " account of the external affairs of the house, " and that he has conferred his powers of at- " torney, to represent him, and to act for him " in this Colony, to George Rougier Lagane, " Esquire, the chief employé of the firm, and " Robert Glaspoole Lancaster, Esquire, the " Manager of the Branch of the Oriental " Bank established in this Colony.

" That, for the carrying on of the opera- " tions of the firm, it has become necessary " to obtain advances, and that the represen- " tative of the firm have obtained, for this " purpose, from the Oriental Bank, the assis- " tance they have required.

" That it is of public notoriety that the " situation of affairs, in general, in this Colo- " ny, is, at present, a difficult one, in conse- " quence of the great accumulation of colonial " product, of the reduction of prices, and " even of the extreme difficulty in now effect- " ing sales.

" That it is consequently indispensable " that an assistance to the firm be continued; " that the Oriental Bank is disposed to con- " tinue that which it has already given, pro- " vided sufficient security, by mortgages, " against certain of the Estates of the late " Edward Chapman, be handed to the Bank.

" That this condition, required by the Bank, " is perfectly fair and just, and that the par- " ties interested have no objection to consent " to it, but that George Henry James Mo- " bery Chapman, being still but an emanci- " pated minor, he cannot concur in granting " the mortgages, without being authorized so " to do by the advice of a family Council.

" That your Petitioners, therefore, respect- " fully request your Honor may be pleased to " fix a day, for the meeting before your Honor, " of a family Council of the emancipated mi- " nor aforesaid, for the purpose of authorizing " him, the said emancipated minor, to concur, " with the assistance of his Curator. in con- " ferring the mortgage, in favor of the Orien- " tal Bank, to the amount of twenty thousand " pounds sterling, or one hundred thousand " dollars, against the Estates *Queen Victoria*, " *Woodford*, and *Louisa*, or against any " other Estates, if necessary, in order to se- " cure the reimbursement of the advances " which the Oriental Bank has already made, " or may hereafter make to the firm of Ed- " ward Chapman & Co."

On the same date, viz: fifth December 1854, the same parties, in like manner, presented another Petition to the Master, setting forth :

" That Mr Ernest Leclézio was a part " owner of the Estate known by the name of " " *La Grand' Baie*," which he has since " purchased in totality, upon the sale thereof " " *per licitationem*," between himself and " the other co-proprietors.

" That he was likewise a part owner for " one twelfth of another Estate known by " the name of *Mont Mascal*.

" That the commercial firm of Chapman " and Barclay was charged with the affairs, " and with commission, of the two Estates " *La Grand Baie*, and of *Mont Mascal*, and " were creditors thereof to the amount of " sums of considerable importance.

" That Mr Ernest Leclézio having become " proprietor of the whole of *La Grand Baie* " Estate, was charged with the settlement, " with Messrs. Chapman and Barclay, for the " payment of their claims against the Estate. " He did so effect such payment and, more- " over paid, over and above the price of his " purchase, a sum of ten thousand and twenty " six dollars and eighty cents of a dollar, " which Messrs. Chapman and Barclay had " promised and had bound themselves to re- " imburse, as soon as they would be paid the " full amount of their claims, against the " *Mont Mascal* Estate, with interest at the " rate of six per cent per annum.

" That the firm of Edward Chapman and " Barclay has ceased to exist, and Mr. Edward " Chapman, remaining sole liquidator thereof, " and having become subsequently sole owner " of his Estates, purchased that portion of the " *Mont Mascal* Estate, which had belonged to " the Chauvet Bankruptcy, and to the widow " Blaize, and had treated for the purchase of " that portion which belonged to Mr. Adolphe " Autard de Bragard and also of that which " belonged to Mr. Ernest Leclézio.

" That the sales of these divers portions " were made in liquidation of the claim of

" the firm Chapman and Barclay, against the " *Mont Mascal* Estate, which gave conse- " quently rise to the exercise of Mr. Ernest " Leclézio's right to claim payment, in prin- " pal and interest, of the sum of ten thousand " and seventy six dollars and eighty cents of a " dollar above mentioned.

" That Mr. Chapman had agreed, with Mr. " Leclézio, upon the mode of settlement of " this claim, amounting in principal and in- " terest up to twenty fifth December 1852, " to the sum of $17,122. 16¢ of which " $10,076 80¢ was for the principal above " mentioned, and $7045. 36¢ for interest, at " the rate of six per cent per annum, up to " the said twenty fifth December 1852,

" That the payment of the aforesaid sum of " $17,122. 16¢, agreed upon and fixed to be " into six equal terms of $2853. 69½¢, each pa- " yable from year to year, from the 25th of " December 1860, with interest as the rate of " 6 per cent payable every year,

" The payment of the above sum was to " be guaranteed by a mortgage against the " portion purchased by Mr. Edward Chapman, " from Mr. Ernest Leclézio, against that pur- " chased from the Chauvet Bankruptcy, and " from the Widow Blaize, and also against " that which Mr. Chapman had purchased " from Mr. Adolphe Autard de Bragard, and " against that which he had the intention " of purchasing from Mr. Guibert,

" The above purchase likewise made in li- " quidation of the claims of Messrs Chapman " and Barclay against the said portions. All " the above stipulations, although agreed " upon between parties, had not been finally " put *en règle* when the death of Mr. Chap- " man took place,

" His representatives are now willing and " have an interest to bring the matter to " a close, but George Henry James Mobery " Chapman, being still but an emancipated " minor, cannot concur in the deeds of sale and " in the mortgage in question without the " authority of a Family Council,

" Your petitioners, in consequence, request " that Your Honor may be pleased to fix a " day for the meeting of a Family Council " of the emancipated minor, George Henry " James Mobery Chapman, for the purpose " of deliberating upon the object of the pre- " sent Petition, and authorizing him to con- " cur, with the assistance of his Curator, in " the deeds of sale and the grant of Mortgage " mentioned and explained as aforesaid.

On the day fixed by the Master, viz: the 8th December thereafter, a Family Council was held, for the purposes set forth in the first of the above applications, all the parties present, (six in number) unanimously declared that they were of opinion, " that the said " emancipated minor should be authorized to " concur, with the assistance of his Curator, " in conferring the mortgages, in favor of the " Oriental Bank, to the amount of £20.000 " or $100,000, against the Estates *Queen* " *Victoria*, *Woodford* and *Louisa*, or against " any other Estates, if necessary, in order to se- " cure the reimbursement of the advances which " the Oriental Bank has already made, or may " hereafter make, to the firm of Edward Chap- " man & Co., as mentioned in the Petition " above recited, and to which, reference is " made for the present authorization.

The same parties so met in Family Council, with repect to the 2d of the above Petitions, unanimously declared " that they are of ' opinion that the said emancipated minor " should be authorized to concur, with the as- " sistance of his Curator, in the deeds of sale, " and the grant of mortgage relative to the " *Mont Mascal* Estate.

On the 18th December thereafter, two *Præcipes* were filed, by the said Henry Hancock Terry, at the Chambers of the Honorable Sir J. E. Rémono, First Puisne Judge of the Supreme Court. The first of these was in the following terms:

" In the Matter of:

" Mary Jane Burnett, the widow of the " late the Honorable Edward Chapman, and " George Henry James Mobery Chapman, " an emancipated minor, and Sholto James " Douglas, Esquire, the Curator to his eman- " cipation,

" *Præcipe* for a Judge's Order to approve " and confirm a deliberation of the Family " Council of the emancipated minor George " Henry James Mobery Chapman, assembled " before the Master of this Court, on the 8th " December instant, (1854) for the purpose " of authorizing the said minor to concur, " with the assistance of his Curator, in con- " ferring the mortgages therein described, in " favor of the Oriental Bank,

" Port-Louis, 18th December 1854.

(Signed) " Henry H. Terry,

" Attorney for Applicants."

On the back of the said *Præcipe* is written, in the hand, since deceased, of the clerk of Sir Edouard Rémono, these words: " Præcipe " 19 Xbre 1854. Ordre No. 916."

The second *Præcipe* was in these terms:

" In the Matter of:

" Mary Jane Burnett, the widow of the late " the Honorable Edward Chapman; George " Henry James Mobery Chapman, an eman-

" cipated minor, and Sholto James Douglas, " Esq., the Curator to his emancipation.

" *Præcipe* for a Judge's Order to approve " and confirm a deliberation of the Family " Council of the emancipated minor George " Henry James Mobery Chapman, assem- " bled before the Master of this Court, on the " eighth December instant, (1854) for the " purpose of authorizing the said minor to " concur, with the assistance of his Curator, " in the deeds for the purchase of a portion " of the *Mount Mascal* Estate, and to grant a " mortgage against the said *Mount Mascal* " Estate, as related in the deliberation of the " Family Council aforesaid.

" Port-Louis, Mauritius, 18th December 1854.
(Signed) " Henry H. Terry.
" For the Applicants. "

On the back of the said præcipe is written:

" Præcipe, 19th X bre. 54. Ordre No. 915. "

In the " Ordre Book " of Sir J. E. Rémono, kept at the period in question, the following entries appear in a tabular form :

Date.	No.	Parties.	Attornies.	Summary of application.	Result.	Observation.	Nature of Document.	Fees.
1854 Dec: 19	915 & 916	Exparte. widow Chapman & others.	Terry.	Homologation of Resolutions of 2 Family Councils held for hypothecating "*Mont Mascal*" Estate.	Referred to M. P.		2 Orders.	£ s. d. 0 6 8
Dec: 22	932 & 933	Exparte. widow Chapman & others.	Terry.	Same as the foregoing. Nos. 915 & 916.	Granted.		2 Orders.	0 6 8

In a detailed Statement, given by the Oriental Bank, it is said that the position of the debt, due to it by Messrs. Edward Chapman and Company, on the 23rd December 1854, was as follows :

Over drawn Current Deposit Account	$ 51,694. 12
Bills Discounted Current.....	$ 50,457. 11
Loan account, or advances against Sugar	$141,978. 09
	$244,129. 32

What is called " the Current Deposit Account " commences on 26th October 1853 and ends on the above date of 24th December 1854, and shews operations to the amount of $ 808,014. 74. ¢

The portion of the account " Bills Discounted " current, bears the following title :

" Messrs. Edward Chapman & Co., in ac- " count with the Oriental Bank Corporation, " for Bills discounted, upon which they were " drawers, acceptors or endorsers, current or " remaining due at 23rd December 1854. "

The Loan account is entitled : " Loan Account, or advances against produce, &a."

" Messrs. Edward Chapman and Co. in account with the Oriental Bank Corporation."

The first entry bears the date of Dec. 10th 1852, and the last that of 15th Dec. 1854.

On the 23rd Dec. 1854, the said William Hervey, as representing Mrs. Chapman and George Chapman, as above stated, granted, along with the Curator of the latter, a Mortgage in favor of the Oriental Bank, on the Estates " *Queen Victoria*," " *Woodford*" and " *Louisa*, " for the sum of £ 20,000 or $ 100,000, on the narrative that :

" The Commercial Firm of Edward Chapman & Co. is indebted to the Oriental Bank Corporation, to a very large amount, for negociable effects subscribed or endorsed by the said Firm, and other advances, exceeding in the whole £ 20,000. The Oriental Bank Corporation having required a security being given, by a Mortgage, the representatives of the late Mr. Chapman could not but accede to that demand, and declared they were ready to give the mortgage upon the Estates being the property of the late Edward Chapman personally.

"And the minor Chapman being but emancipated, was obliged to have recourse to a family Council for the necessary authorization, to concur in the grant of the Mortgage in question, which necessary authorization was given as hereinbefore related.

"Now therefore, and in order to secure to the

Oriental Bank Corporation the reimbursement of all sums already due and owing to the said Bank, on whatsoever account, by the firm of Edward Chapman & Co.

"The Widow Chapman, acting as the executrix and legatee of her late husband, and as heir of her late daughter and represented as aforesaid.

"George Henry James Mobery Chapman, also acting and represented as aforesaid, and Sholto James Douglas, as Curator upon the emancipation of the said George Henry James Mobery Chapman.

"Declare, by these presents, that they mortgage, to the amount of £ 20,000, or $100,000, the above named Estate *Queen Victoria, Woodford*, and *Louisa*."

The deed recites the Family Council held before the Master, on 8th December 1854, but says nothing of any homologation by the Court or by any Judge thereof.

On 29th March 1855, this Mortgage was inscribed in the Registers on the 27th Dec. 1854.

On 29th March 1855, by a deed at London, Mrs. Chapman, George Chapman (then of age) and Atholl Burnett, on the recital of the different capacities of the said Mrs. Chapman and George Chapman, and that they, with the said Atholl Burnett, were severally seized and concerned in the several plantations, in Mauritius, known by the names *Queen Victoria*, &a., did nominate the said Atholl Burnett who was about to proceed to Mauritius, their attorney, with very ample power to act for them in all their affairs in that Island, to receive and pay debts, to sue for them, to sell, exchange or mortgage any part of the said lands or plantations, to receive payment of such sums as he shall accept, in satisfaction of the claims of the said Widow Chapman and George Chapman, in any capacity, to enter into arbitrations regarding matters in which they may be concerned, to take possession of all the Estates and property in the Island, belonging to them, to pay of all claims and demands which the said Mrs. Chapman or George Chapman might have on the Estates, if that should be thought proper, to assume partners for the management of the Estates, &a., &a.

On the 8th May 1855, a deed af agreement was entered into, in London, between Mrs. Chapman and George Chapman, as sole representatives of the succession of the late Edward Chapman, of the first part; Atholl Burnett, as sole surviving Member of the Commercial firm of Edward Chapman & Co., of the next part; R. M. Laffan, Captain in the Royal Artillery of the next part, and David Barclay Chapman, banker, in London, acting in his own personal name, as well as in the name and for the Commercial firm of Overend Gurney & Co. By this deed, Mrs. Chapman, (then Mrs. Mc. Pherson,) Henry Chapman and R. M. Laffan, acknowledged themselves to be debtors of the said D. B. Chapman, for himself and as acting for the said firm of Overend Gurney & Co., of the sum of £62,000. 18. 2, as on the first January 1856, and charged and hypothecated, for payment of the said sum, the Estates of "*Queen Victoria*," "*Woodford*," "*Louisa*," and two third of *Mont Mascal* in this Island.

On this arrangement, formal inscription of mortgage was made, on 11th November 1857.

The Oriental Bank does not dispute the *bona fides* of this arrangement or the regularity of the mortgage following thereon, but it urges that its own mortgage, being anterior in date and inscription, must be first collocated on the sale price of the Estate, according to the fixed law of the Colony.

On the 11th August 1855, Mrs. Chapman, then by a second marriage Mrs. Mc. Pherson, (along with her husband Dr. Mc Pherson,) on the recital of the will of Edward Chapman and other deeds, (by one of which she had agreed to release her whole interest in the Estate of her first husband, on his Estate being charged with the payment to her of the yearly sum of £600, and of the sum of £5000 convenanted to be paid to her by her marriage contract with him,) appointed Mr. James Canonville, and if he should decline to act, Mr. A. C. Mc Pherson, of Port Louis, to be her attornies in Mauritius, in reference to the payment of the said £600, and to act for her in the affairs of the said Edward Chapman in Mauritius generally, with special powers to recover debts and dispose of property, to sue, to recover payment of monies, to settle all accounts with the Estate of Edward Chapman, or any other person, to enter into compromises or arbitrations, and to do all other things, in the affairs of the said grantors of the deed, as if they were personally present, &a., &a.

On the 16th November 1855, by a regular notarial deed, to which the said Atholl Burnett and James Canonville, on the one part, and James Edward Arbuthnot, representing the Oriental Bank Corporation, on the other, were parties, it was agreed that a mortgage should be granted, and a mortgage was granted, in favor of the said Bank, on the Estates *Queen Victoria, Louisa, Woodford*, and other subjects, for the sum of $177,159, 34¢. The deed bears that the said Atholl Burnet acted:

"1o. Au nom et comme seul membre sur-
"vivant de la maison de Commerce établie
"en cette Colonie sous la raison sociale Ed-
"ward Chapman & Co.

"2o. Au nom et comme mandataire de Mr.
"George Henry James Mobery Chapman,

" Lieutenant au cinquième Régiment de Sa " Majesté, aux termes d'une procuration en " date, à Londres, du 25 Mars dernier. (1855.)

" Monsieur James Canonville, négociant, " demeurant en cette ville du Port Louis.

" Agissant au nom et comme mandataire, " en cette colonie, de Madame Mary Jane " Burnett, veuve en premières noces, de l'Ho- " norable Edward Chapman, en son vivant " négociant et membre du Conseil du Gou- " vernement de cette Ile, et actuellement " épouse, en secondes noces, de Mr. Enéas " Mackintosh Macpherson, chirurgien d'état " Major, demeurant tous deux à Cheltenham, " dans le Comté de Gloucester, aux termes " d'une procuration datée du 11 Août dernier."

" Agissant, la dite dame Veuve Chapman, " actuellement épouse de M. Mac Pherson, " comme exécutrice testamentaire et légataire " du dit feu Sieur Edward Chapman, son pre- " mier mari, aux termes du testament olo- " graphe de ce dernier, en date des 3 et 5 " Juin 1854, enrégistré et déposé pour minute au dit Me. Guimbeau, l'un des notaires sous- " signés, par acte devant lui et son collègue, " en date du 5 Juillet de la même année, en- " registré Registre A. 108 No. 3862."

" Et, en outre, comme héritière de Mademoi- " selle Mary Georgina Chapman, sa fille, dé- " cédée après son père."

" Et M. George Henry James Mobery " Chapman, comme héritier de son père et " de sa sœur."

Ensemble d'une part.

" Monsieur James Edward Arbuthnot, né- " gociant, demeurant en cette ville du Port " Louis ; agissant pour et au nom de la Cor- " poration existant à Londres sous le nom de " " The Oriental Bank Corporation," dont il " est administratenr, autrement dit " Mana- " ger " de la branche établie à l'Ile Mau- " rice."

" D'autre part. "

" Lesquels, avant d'en venir à l'affectation " hypothécaire qui fait l'objet des présentes, " ont préliminairement exposé ce qui suit: "

" La maison de commerce Edward Chap- " man and Co., et les représentants de feu " l'Honorable Edward Chapman sont, par " suite de billets à ordre, effets de commerce " souscrits ou endossés par eux, et pour ba- " lance de compte courant, indépendamment " du montant de toutes lettres de change, tirées " par la maison de commerce Edward Chap- " man and Co., et dont la susdite Banque " pourrait être porteur, débiteurs envers la „ Corporation de la Banque Orientale d'une „ somme qui, en capital et intérêts, s'élève, „ valeur du 8 Novembre courant (1855) à " $ 177.559, 34 ¢, ainsi qu'il résulte d'un " compte établi entre parties, sous la date " du dit jour, et dont l'original est demeuré " annexé à la minute de l'acte de transport " ci-après relaté. "

The deed goes on to state that, in guarantee of the full payment of the said debt, Messrs. Edward Chapman & Co., and the representatives of Edward Chapman had, of the same date, assigned to the Bank the sum of $ 70.360. 66 ¾ owing by Mr. C. A. Mollière and Made. P. L. Mollière, (who were intervening parties to the deed,) and also granted a separate transport, of the same date, to carry out the arrangement, being the balance of the price of certain immoveable properties, sold to the said parties by Messrs. Chapman and Barclay and Barclay Brothers & Co. The deed goes on to state that, on condition of the said assignment, and the other conditions stipulated, the Bank had agreed to grant delay for payment of the said debt, to certain dates therein mentioned.

By an Indenture, dated at London 7th May 1855, the sole and exclusive control, management and disposition of the Estates and properties of Edward Chapman and Edward Chapman & Co., in Mauritius, were vested in Robert Michael Laffan, Captain in the Royal Engineers. By Indenture, dated 8th May 1857, he appointed the said Atholl Burnett to be his attorney in the Island of Mauritius, for the management and cultivation of the Estates, and for the management of all affairs therewith connected, with ample powers of granting mortgages for carrying on the Estates, to receive and pay money, to sue and submit to arbitrations, &a, and generally to act in the entire management and conduct of all the affairs and concerns of every kind and description in any manner relating to or connected with the said Estates and properties, and the management and cultivation thereof, and to use and pursue all such ways and means, and make, do and execute all such acts, matters and things, as may be requisite or expedient for that purpose, and for the executing, carrying out and effectuating all the powers, provisions, clauses, conditions and stipulations of the hereinbefore in part recited Indenture of the 7th May 1855, and every matter, cause and thing in any wise relating thereto " as fully and effectually, to all intents " and purposes, as I, the said Robert Michael " Laffan, could or might do if personally " present. "

By notarial deed, dated 23rd November 1857, Sholto James Douglas, Substitute Procureur and Advocate General of Mauritius, was conjoined with the said Atholl Burnett, by the said Robert Michael Laffan, as attorney for the management and cultivation of the Estates.

On the 1st December 1851, certain arrangements were entered into, between the Orien-

tal Bank, of the first part, the said R. M. Laffan, in his capacity aforesaid, and represented by the said Atholl Burnett and Sholto James Douglas, of the 2nd part, and the said C. A. Mollières and Mrs. P. L. Mollières, of the 3rd part. These arrangements are evidenced by a notarial deed of that date. The deed recites the 2nd Mortgage which had been granted in favor of that Bank, by the representatives of the late Edward Chapman, the *Transport*, by the Mollières in favor of the Bank, certain legal proceedings which had been taken by the Bank, and other parties, for the protection of their rights, and then it is said: " Dans le but de mettre fin à " tous ces procès, les parties sus-nommées ont " arrêté ce qui suit: Monsieur Charles Adrien " Mollières et Madame Paul Lisis Mollières " déclarent donner main levée pure et simple " de l'opposition formée par eux aux pour- " suites en expropriation forcée des biens " " *Virginia* " et " *Fantaisie*," commencées " par l'Oriental Bank Corporation, renoncer " à la demande en nullité, tant des dites pour- " suites, que des contrats du 16 Novembre " 1855, précités, introduite par eux, suivant " Déclaration en date du 21 Mars 1859, sous " la constitution de Me Eugène Leclézio, en- " régistrée au R. A. 118 No. 2429, et accepter " purement et simplement le transport en ga- " rantie fait à la dite Corporation, par la " maison E. Chapman & Co., et les représen- " tans de Monsieur Edward Chapman, sui- " vant acte au rapport de Me Guimbeau, en " date du 16 Novembre 1855, ainsi qu'il est " dit ci-dessus. "

" Monsieur Laffan, de son côté, déclare en " tant que de besoin, accepter et ratifier le " dit acte de transport et tous les autres actes " faits avec la dite Corporation, par Mr. " Atholl Burnett, comme membre survivant " de la maison E. Chapman & Co., et comme " mandataire de Mr. George Henry James " Mobery Chapman, et par Mr. James Ca- " nonville, comme mandataire de Mme. Vve " Edward Chapman, épouse en secondes noces " de Mr. Enéas Makintosh Macpherson, re- " lativement à la créance de la dite Corpora- " ration sur Mr. Edward Chapman & Messrs. " E. Chapman & Co., voulant le dit Sieur " Laffan que les dits actes, sans aucune ex- " ception ni réserve, aient leur plein et entier " effet, et reconnaissant que les dits actes " ainsi que les obligations y contenues, ont " été en partie exécutés par lui, dit Sieur " Laffan, en ses qualités susmentionnées, de " façon que la créance de la dite Corporation, " qui était originairement de $177,159. 34¢ " se trouve actuellement réduite à la somme " de $69,467 90¢, valeur du 15 Janvier " 1859, sauf erreur ou omission."

The Bank, reserving all its other rights and securities, in payment of the debt due by Edward Chapman, consented to extend the term of payment of the obligation of the Mollières, which had been assigned to it in guarantee. The deed then contained the following clauses:

" Aux présentes sont intervenus Mr. " George Henry James Mobery Chapman, " agissant tant comme fils et héritier du feu " Sr. Edward Chapman, que comme héritier " de sa sœur Mlle. Marie Georgina Chapman, " et, encore comme cessionnaires, conjointe- " ment avec Mr. Robert Michael Laffan, des " droits de la maison E. Chapman & Co., et " des représentants de la succession de Mr. " Ed: Chapman; le dit Sieur George Hen- " ry James Mobery Chapman représenté à " Maurice par Mr. Sholto James Douglas, " Substitut du Procureur Général, demeurant " au Port Louis, suivant acte au rapport de " Me. Guimbeau et son collègue notaires, en " date du 1er Avril 1859, enrégistré au R. A. " 118 No. 3921, contenant substitution par " Mr. Atholl Burnett à Mr. Sholto James " Douglas, des pouvoirs à lui donnés par le " Sieur Chapman, par acte passé à Londres, " sous la date du 29 Mars 1853, déposé en " l'étude du dit Me. Guimbeau, suivant acte " au rapport du dit Me. Guimbeau et son " collègue notaires, en date du 24 Septembre " 1855, le tout enrégistré au R. A. 112 Nos. " 2420 & 2421.

" Et Made. Mary Jane Burnett, veuve en " premières noces de Mr. Edward Chapman, " et actuellement épouse en secondes noces de " de Mr. Enéas Makintosh Macpherson, et de " ce dernier dûment autorisée, agissant la " dite dame tant en son nom personnel que " comme héritière de sa fille, Mlle. Georgina " Chapman, les dits Sr. et De. Macpherson, " représentés à Maurice par Mr. Alexander " Campbell Macpherson, propriétaire planteur, " demeurant au quartier du Grand Port, en " vertu d'un acte en date, à Rochester, dans " le comté de Kent, du 13 Novembre 1857, " lequel acte sera déposé dans l'étude de " Me. Guimbeau notaire, enrégistré.

" Lesquels, après avoir pris communication " des conventions qui précèdent, déclarent les " avoir pour agréables et renoncer purement " et simplement à toutes demandes ou actions " tendant à faire prononcer la nullité, tant de " l'obligation avec affectation hypothécaire, " souscrite au profit de l'Oriental Bank Cor- " poration, que du transport fait à la dite " Oriental Bank Corporation le 16 Novembre " 1855, et notamment à la demande formée " contre la dite Oriental Bank Corporation et " les autres parties ci-dessus dénommées, " suivant Déclaration, en date du 13 Avril " 1859, sous la constitution de Mr. Ernest " Boullé, avoué, enrégistré le lendemain 14, " au R. A. 119, Fo. 472, lequel transport " ainsi que tous actes précédemment ou " postérieurement consentis, au profit de la " dite Corporation, pour assurer le paiement " de sa créance sus mentionnée, sont, en " tant que de besoin, ratifiés, acceptés et " confirmés par le dit Sieur Chapman et les " Sr. et De. Macpherson, à ce exprès autorisés " par M. Laffan, leur cessionnaire."

DOUGLAS. Subs : Proc : Gen : for the Bank.

Appellants against the Master's Decision.

Recites deeds and Master's judyment.

I maintain, in opposition to the Master's views, that a Judge at chambers could, at every period, since the remodelling of our Courts in 1851, homologate the proceedings of a family Council. By art. 458 of the C. C. it is enacted : " Les délibérations du conseil de " famille, relatives à cet égard" (here hypothe- " cating the landed Estate)" ne seront exécu- " tées qu'après que le tuteur en aura deman- " dé et obtenu l'homologation devant le Tri- " bunal de Première Instance, qui y statuera " en la Chambre du Conseil, et après avoir " entendu le Procureur Impérial."

The duties performed in the " Chambre du Conseil," here mentioned, are precisely similar to those of a Judge at chambers, under our present forms. No public sitting was ever required, in such private matters, and the witness Delainé, who was sub-Registrar of the Court of First Instance, tells us that when that Court existed the President, who usually sat alone performed this duty at home, in his own private residence.

A Judge at Chambers has really the authority of the full Court (Charter of Justice, 1851, § 5. CHITTY's Practice III. p. 15.—*R. v. Wilkes.* 4 Boroughs' 2571.—*Prescott v. Roe.* 9. Bing. 104. ; a Judge's Order not appealed from is final and conclusive. CHITTY's Practice, III 26. A Judge's Order is the property of the party obtaining it, Lush's Practice by STEPHEN, p. 673—4, and the missing documents ought to be in the hand of the parties obtaining them. If it is now lost, any party interested can procure a duplicate original. Ibid p. 673. When the application was made, it was the vacation of the Court, and such a pressing matter would not wait for 6 weeks, till the meeting of the full Court. Sir J. E. Rémono has deposed that the practice to resort to the Judge at Chambers, in such cases, was invariable. The Ordinance No. 24 of 1855 was passed merely to remove doubts which had arisen in the minds of some persons as to the powers of a Judge at Chambers. The part of the Ordinance referring to this matter was simply a declaratory enactment pointing out what the law really was, not making a law for the first time. If we were to assume that the Judge's Order was not granted, we are still in time to ask it *nunc pro tunc*. There is no Appeal from the Master's Court, on the point of the admissibility of parole evidence, as to the fact of homologation. That question therefore cannot now be competently raised.

There are various points of Colonial or, as I may term it, French law, which present themselves for consideration in this case.

In the first place, assuming there was no proof of the fact of homologation, I submit that, in a case like this, homologation of a Family Council was not required. This was not the case simply of acts done by a minor but of things performed by an emancipated minor who has far greater powers. A person in that position, has, to a great extent, the unrestrained administaation of his property. In certain circumstances, he may grant a mortgage, not perhaps for new debts, but to secure debts left by his ancestor, which was all that was done here ; such an act does not prejudice the *Actif* of the Estate. I rely on the authority of DURANTON VIII. § 678. I do not deny that there may be authorities the other way, but the weight of authority is with me. A mortgage is not an " alienation." Thus a proprietor, whose property is seized by a creditor, cannot alienate the property, but he may mortgage it. C. C. Proc. 686 and following. GILBERT, in loco, particularly No. 8 ; and an authorities there quoted. The only author of weight, who disputes this, is CARRÉ. Ibid. See also TOULLIER v. 2. § 298. ZACHARIÆ v. 1. § 241. SIREY 41 : 1 : 614.

From this it follows that a beneficial act, done by a minor, will be maintained though it may exceed the bounds of pure administration.

The emancipated minor's powers are still farther enlarged, if he becomes a trader. Article 6, C. Com.

" Les mineurs marchands, autorisés comme " il est dit ci-dessus, peuvent engager et hypo- " théquer leurs Immeubles. Ils peuvent " même les aliéner, mais en suivant les for- " malités prescrites par les articles 4, 5. 7 et " suivants du Code Civil. "

In this case the minor exercised the option given by his father's will, of becoming a trader, and engaged in the business of the firm. By the mortgage in question he saved the house from imminent bankruptcy. (See the words of the Petition to the Master for the Family Council ;—already quoted.)

But it may be said that the Code of Commerce requires certain preliminary things to be done, before a minor in trade shall enjoy such privileges, and that these were not attended to in this case. I admit that the second formality of Art. 2 of the Com. C. was omitted. Little was known, at the time, of the existence of the partnership. It was however, really subsisting, and a formal deed of society was executed, on death bed, by Mr. Chapman. (See parole evidence of S. J. Douglas.)

By the immediately following Article of the Code de Commerce (Art. 3) the above rules are applicable to minors, even though not engaged in commerce, so far as regards the acts there specified. And a minor commerçant cannot be restored against his obligations. C. C. Art. 1308. GILBERT. TROPLONG § 493 " Hypothèque. "

Our opponents were well aware of the amount of debt due by the Chapman family, when they advanced their loan.

They were relations of the family, and had a schedule of the whole debts submitted for their inspection.

In any point of view, the nullity can only be invoked by the minor, or by his creditors exercising his personal rights, " dans son nom et dans ses droits " C. C. 1166.

There was no absolute nullity here. I adopt the definition of absolute and relative nullities, as given by *Toullier*. Vol. VII: § § 556, 564. See also *Troplong*. Hyp. Vol. 2. § 493. *Merlin. Questions de Droit*. Hyp. A *nullité de plein droit* or *ipso jure* is not necessarily an absolute nullity. *Troplong*. Vente. 2. § 687. Hyp. 2. § 492. *Zachariae*. 1. P. 35.

In all the cases which appear to be in opposite tendency, the minor himself was a party to the suit. I also refer to the authority of *Zachariæ* § 37. He is of the same opinion as *Toullier*.

But, in the next place, I contend that if it were to be held, as a general rule, that proof of the homologation of the family Council is invariably required, under pain of nullity of the mortgage, the subsequent ratification by the minor in the present case, would cure all defects. I rely on the following articles of the Code. 1311.—1338.

" 1311.—Il n'est plus recevable à revenir " contre l'engagement qu'il avait souscrit en " minorité, lorsqu'il l'a ratifié en majorité, " soit que cet engagement fut nul en sa forme, " soit qu'il fut seulement sujet à restitution.

" 1338.—L'acte de confirmation ou ratification d'une obligation contre laquelle la " loi admet l'action en nullité ou en rescision, " n'est valable que lorsqu'on y trouve la " substance de cette obligation, la mention " du motif de l'action en rescision et l'intention de réparer le vice sur lequel cette action est fondée. A défaut d'acte de confirmation ou ratification, il suffit que l'obligation soit exécutée volontairement, après " l'époque à laquelle l'obligation pouvait être " valablement confirmée ou ratifiée. La confirmation, ratification ou exécution volontaire, dans les formes et à l'époque déterminées par loi, emporte la renonciation aux " moyens d'exceptions que l'on pouvait opposer contre cet acte, sans préjudice néanmoins " du droit des tiers. "

In the present case, as to the fact of ratification, we have it in the deed granted by George Chapman in favor of Overend Gurney & Co. and in various other deeds, some preceeding, some following the deed in favor of Overend Gurney & Co. Then we have the strongest of all ratifications, viz : the payments made, from time to time, to the Oriental Bank. The last and perhaps the strongest ratification is in the deed of George Chapman of 1st December 1859.

In the present case, there are no *droits des tiers*. I do not deny the validity of my opponents, Mortgage. though I say mine is preferable to theirs, by retroactive effect The authorities, on this part of the case, are quite conclusive, if the distinction between absolute and relative nullities is clearly kept in view. TOULLIER, Vol. VII § 563, and following.

But I submit that, in law, no ratification was required, as the nullity, in any view, was only a relative one, not an absolute nullity. The minor, to whom alone the right of challenge was open, has never attacked it in any shape whatever.

It must also be borne in mind that Mrs. Chapman, the widow, was interested to the amount of $^5/_{12}$ of the whole succession. And none of the difficulties raised on the other side can touch her interest.

Lastly, I maintain that the action, in its present shape, is altogether wrong and untenable. If our apponents seriously intend to attack our Mortgage, they should have proceeded by way of a separate and formal action. They are not exercising any rights belonging to their debtor ; the cause is quite different from a suit to nullify a security, which suit has been set a going by the minor, who is himself the debtor.

THE HONORABLE H. KŒNIG, in answer:

The real question, between the parties, has not I think, been placed, with sufficient distinctness, before the Court. We are now discussing an " *Ordre* " of the sale price of the Estate " *Queen Victoria.*" All the creditors are called together, to make good their claims and their rights on this sale price. They must be ranked in the order of their legal preferences. The question is one of arranging mortgages, not of the existence of debts. Every competitor must show that his mortgage is, in all respects, quite regular and complete. Every hypothec to take its place in the "*Ordre*," must be perfectly good in substance as well as in form.

Let us now look at the facts. The late Hon. Mr. Chapman recommended his heirs, in his settlement made on death bed, to retain his Estates, if possible. It was soon discovered that, to meet all the obligations of the deceased, there was a deficit of not less than two or three hundred thousand dollars, and the new arrangements, made by those who represented him, were neither wise nor judicious. He died, as has been seen, in June 1854, and the emancipation of his children followed soon after. The chief reason of this was that his son was an officer in the army. Well, Mr.

Burnett, the brother in law and the alleged partner of the deceased, (but the deed of partnership was never legally regularized,) soon left the Island leaving a power of attorney to the then Manager of the Oriental Bank; so did the widow and the son George Chapman, who left their power of attorney with Mr. Hervey. So all the parties personally interested in the succession, left the Colony, and returned to England.

In London, they asked the assistance of my clients, and they received it. It is admitted on the other side, that we made the full advances in hard cash, for which we now claim to be ranked under our mortgage. In the interval, while we, in England, were dealing with the principals and assisting them, the deeds on which our opponents rely, and base their demands, were granted by certain persons in the colony, said to have legal authority to bind their constituents, and their Etates. We, at least, dealt with the real principals, and no question has been ever mooted as to the validity and regularity of our demand; we were altogether *en règle*. But we attack the mortgage, on the other side, and we say it is defective, and not good in law. In truth, we find George Chapman, a merely emancipated minor, taking it upon him to act exactly as if he had been a major. We say he had no legal power to act as he did. He could not depute to Hervey a power so eminently personal as that of summoning a meeting of a Family Council, or at all events it would have been necessary to give Hervey the most express and special powers for this purpose, but that was not done. In law, I say, even if express power had been given to Hervey, the minor himself, before giving such power ought to have been authorized, by the decision of a Family Council: but this was not done. Again when the Family Council was called, it was not sufficiently informed of the real situation of the Estate. The figures put forward, by the Bank, were not established by any real evidence. On the contrary, looking at the accounts themselves, it will be seen that, while a debt of $22,000, is stated as due to the Bank, on the cash account, there is, on the other side, a credit admitted of $9000, which reduced that part of the debt to about $12000, in round number. There was no doubt some $50,000 of bills due also, and in the interval the balance would probably undergo some change.

Let us assume, in the first place, that a Family Council might have been legally assembled, and might have legally acted for the purpose contemplated. The evidence, to shew that such a Council was held and did sanction what was done, is altogether defective. It is said the documents themselves have been lost, or at least have disappeared. But there is no proof that they ever existed. In the Bank's mortgage there is no mention whatever of the homologation of the deliberations of the Family Council. In the States of the debts of Chapman, exhibited to us in London, there is no entry of the erroneous sum said to be due to the Oriental Bank Corporation. I deny the possibility of supplying the absence of the documents of homologation themselves by any other sort of proof whatever. Then even, if such secondary evidence could be admitted what is it that we have got? Nothing really, of any weight. We have, in the first place the book kept in the office or Chambers of the Judge, not by himself, be it observed, but merely by his clerk. The object of keeping such a book is not to record what business is really done, but simply to enter the fees or dues to be paid to the Government. The volume is not even signed by any body; such a book can surely never be allowed, either by the law of England or of France, to replace the thing itself, which does not exist, and I say never existed. The learned Judge, Sir Edward Rémono, I need not say a gentleman of the highest honor and respectability, has no doubt stated his recollection of the matter, but how dangerous should it be to substitute mere recollections for written documents. The parties, on the other side of this suit, were the real proprietors of the documents of homologation. They had the interest to see that all was regularly gone about and completed, and it is their duty to produce the *acte*, the absence of which cannot be supplied by any evidence whatever.

It is said there are two proecipes, signed by the Attorney Terry. So there are, but they are mere requests to the Judge to homologate the conclusions of the Family Council, and with respect to these two papers, it must be observed that the name of the Estate "*Queen Victoria*" does not occur in either of them. But there were two Family Councils held at the same time, in the affairs of this Family, but for totally different purposes, and the only property named in the books kept by the Judges clerk is "*Mont Mascal*," there is no mention of "*Queen Victoria*," the sole Estate with which we have any thing to do at present.

Again, Homologation of a Family Council, by a Judge at Chambers, was altogether irregular and inept. The proceedings should have taken place in the Court itself. (C. C. Article 58, quoted above). The words of the Law are imperative. There might have been discussion among the members of the Family Council; (Civ. Pro. Article 883.) and when Sir Ed. Rémono, in his evidence, speaks of no discussion, he is in error. The passing of the Ordinance No. 24 of 18[illegible] is conclusive in support of our views here. It is not a declaratory law for the past. It is a new and positive rule for the futnre. See the title of the Ordinance and the words henceforth in § 2. The actual practice was to bring all these cases before the Court itself, I refer to the evidence of the clerk to one of the Judges, the Honorable Mr. Justice Bestel, and I produce, from

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the records of the Court itself many examples of this. Then there is no evidence whatever of any remit having been made to the "Ministère Public," an indispensable formality. Accordingly I conclude this part of my argument with submitting that the formalities of a regular Family Council, not having been observed, the whole proceedings, on which the mortgage, on the other side is founded, are null and void, and that the hypothec itself is no better than waste paper.

But even had there been proof of a Family Council, and its resolutions duly homologated, would that make a proper and effectual title here? I submit it would not. Certainly an emancipated minor has not the powers and capacities of a major. His powers are confined to acts of administration. C. C. 484, &c. at least he can sell or alienate his immoveable property only after a strict observance of all the formalities required of other minors. Article 684 and Article 2124. But it is said George Chapman was a merchant; that is a mistake, the heir of a merchant is not necessarily a merchant himself; and, in the *acte* of hypothecation, he does not appear in that character. There is no production of any proper act of partnership, or any proper evidence that young Chapman was really a merchant; and none of the necessary steps were taken, under Article 2 of the Commercial Code, to give him the privileges, which a minor in trade may obtain.

But it is said that, after he reached majority, he ratified the security in favor of the Bank. This may be all very well, so far as he and the Bank were concerned, and as regards the amount of the debt between themselves. But, with respect to third parties, whose securities were given in the interval, such ratification can be of no avail. But in point of fact was these any legal act of ratification? All the principals were in England.

Burnett alone returned to the Island. There was no personal intervention of the parties themselves; anything that was done emanated from mere attornies or agents There is no special mention of the acts which are now said to have been intended to be ratified, and are maintained to have been ratified in law.

By article 1338 of the Civil Code, it is enacted:

"L'acte de confirmation ou ratification
" d'une obligation, contre laquelle la loi admet
" l'action en nullité ou en rescision, n'est va-
" lable que lorsqu'on y trouve la substance de
" cette obligation, la mention du motif de l'ac-
" tion en rescision et l'intention de réparer le
" vice sur lequel cette action est fondée. A
" défaut d'acte de confirmation ou ratification
„ il suffit que l'obligation soit exécutée volon-
„ tairement, après l'époque à laquelle l'obliga-
„ tion pouvait être valablement confirmée ou
„ ratifiée. La confirmation, ratification ou
„ exécution volontaire, dans les formes, et à
" l'époque déterminées par la loi, emporte la
" renonciation aux moyens et exceptions que
" l'on pouvait opposer contre cet acte, sans
" préjudice néanmoins du droit des tiers."

It is quite possible that these attornies did not even know of the existence of these securities which they are now said to have ratified. There is no special mention of the deeds said to be ratified. The power conferred upon an agent or attorney, to grant hypothecs can never include the power of ratifying former hypothecs, when there was any real intention, by the parties, to homologate or ratify former deeds; they did so expressly, as will be seen on referring to the latest deed with the Mollières and others.

But *esto* that there had been a deed of formal ratification, what would be its effect in law? Certainly not that contended for on the other side. By Act 1338, as we have already seen, "*les droits des tiers*" can never be prejudiced. No doubt, a great conflict has arisen among eminent lawyers, in Europe, as to the effect of this clause, in certain circumstances, and a retroactive effect has been given to some ratifications, when the original deeds were only subject to what has been called a relative not an absolute nullity. But the best authorities here clearly shew that no ratification of a deed, granted in minority, without the formal and regular intervention of a family Council, by the granter, after his majority, can prejudice the rights of a third party who has previously acquired a right over the subjects. See ZACHARIE Vol. 3.—TOULLIER by DUVERGIER V. 4 p. 431; but the distinction, between a sale and an hypothec, must be noted. A sale is a final and complete act, an hypothec is a mere step, so to speak, towards a sale. In the complement of the debt, which may fusnish a case reported by SIREY, 37, 1, 102 it was decided that:

"La ratification, par un individu majeur, d'une
" vente d'immeuble qu'il avait consentie pen-
" dant sa minorité, sans l'observation des forma-
" lités prescrites, est sans effet à l'égard des
" tiers, auxquels le vendeur a précédemment
" et depuis sa majorité, consenti une seconde
" vente des mêmes biens. (Code Civil. 1338,
" 1663).

" Le mineur qui a vendu un immeuble,
" pendant sa minorité, peut ultérieurement
" revendre le même immeuble sans au préala-
" ble avoir fait résoudre la première vente;
" cette vente est nulle, et non pas seulement
" annulable ou rescindable. (Code Civ. 1125.)

Again, in the same Collection: 39. 2. 5. we have the judgment: "La ratification, par le
" mineur, devenu majeur, d'une hypothèque
" qu'il avait consentie en minorité, n'a pas
" d'effet rétroactif au préjudice d'une hypo-
" théque postérieure, consentie en majorité,
" mais avant la ratification de la première hy-
" pothèque." (Code Civ. 2124, 2126, 1338.)

This is confirmed by the case in SIREY 56. 1, 118. The latest case appears to be reported in SIREY 5 9, 1, 802 which is also to the same effect.

It has been maintained, on the other side, that even if the mortgage in question were bad as to George Chapman's interest, it must be good as to that of the Widow Mrs. Chapman, to whom the difficulties arising out of minority do not apply. But this argument is not well founded.

I contend that the mortgage or hypothec is good for nothing, even as to Mrs. Chapman's share. I say the Inscription of mortgage cannot support any collocation whatever upon the sale price. (Read the description of the parties in the Inscription). Mrs. Chapman is described as sole representative and executrix. But she was a large legatee. How is it possible to discover, from this Inscription, beyond the four corners of which we cannot go, what her real interest was? This writing must, in itself, be quite complete, clear and distinct.

Father there are two other vices and defects in this Inscription. There is no precise term of payment mentioned, and *secondly*, there is no legal evidence of the loan. The mortgage is obviously prepared without care and attention. It sets forth that the Commercial Firm of Edward Chapman & Co. is indebted to the Oriental Bank Corporation to a very large amount, for negotiable effects subscribed or endorsed by the said Firm, and other advances exceeding, in the whole, Twenty thousand Pounds, and so on, to secure payment of which sum, the parties agree to mortgage, to that amount, the Estate "*Queen Victoria.*" So the debt is really said to be a commercial one, and the hypothec is asked really against the heirs of the deceased Chapman, personally. But there is no *Acte Authentique* which the law requires and binding on these heirs C. C. 2129—2148.

There is no fixed date of payment of the alleged debt. The *époque de l'exigibilité* is essential. C. C. Art. 2148. See the authorities collected by GILBERT, under that Article, No. 77 and following.

It is admitted, by the Bank, that they have got large payments, to account of the debt said to be covered by their mortgage; we have got nothing. These payments, so made to the Bank, must be applied to the debts of longest standing. How do we know what part of the debt remains covered by mortgage.

The original act contains no specific information as to the real amount due. In the second act, to which the Mollières are parties, all is arranged. The precise sum is indicated, and a delay of 5 years is given to the Chapmans to pay. All this was done after the date of our security, but before the new security to the Bank. If, previous to this latter, Mrs. Chapman and her son sold all their properties to Laffan, as appears to be alleged, there would be no valid security given thereafter, and no inscription could be taken.

DOUGLAS, in reply.

It is said, on the other side, that the real debt, due to the Bank, at Chapman's death, was only £ 12,000; but it must be remembered that many of the bills, then in currency, fell due subsequently and swelled the debt to the amount which we claim.

The validity of our inscription of mortgage has been attacked, on various grounds. I will notice them in detail. In the first place, under Arts. 2127 and 2129 of the Civil Code, it is objected: (1o.) That there is no *Acte authentique* which establishes the debt, on which the mortgage proceeds. But this is not necessary; on referring to the articles in question, it will be seen that the mortgage itself must be in a formal shape, as an *Acte authentique*, but any sort of debt may be the foundation of the mortgage, of which we have daily examples, in sums due to Brokers, Notaries, &a.

Then, it is argued that no term of payment of the debt is mentioned; and that it does not appear when it was exigible or payable. This is a mistake, no language could be clearer.

The deed bears that the amount was then "due and owing." But, in truth, the original strictness of the Courts of France, requiring every point under Article 2145 of the Civil Code to be minutely complied with, under pain of nullity, is this: Has the opposite party been really prejudiced by any thing which has been omitted to be done by us? TROPLONG's commentary on the above Article. MARCADE continued by v. 2 p. 903 and following down to 907.

Then, it is said, the Oriental Bank took a second mortgage, in the year 1855, and thereby the first mortgage was extinguished by novation. I need not quote the rule of law that novation is never presumed. Besides, the recital of the second deed quite extinguishes any such argument. It bears expressly that the Oriental Bank are creditors for the sum of $ 177,500. The second mortgage was a natural and reasonable consequence of the position of parties. There was no intention to abandon the first security.

It is argued that the debt, covered by the first mortgage, has already been paid off, by the sums already drawn by the Bank, from the Estate of Chapman. But this argument is groundless. It proceeds upon the alleged application of the law of imputed payments: but it presupposes an indication of intention made at the date of payment, but nothing of the kind occurs here. The debt due to us was gradually diminished by payments to account, till it sunk from $ 244,000, on the maximum, to its present amount.

Our opponents have argued that, as the parties did not personally consent to and authorize the mortgage, the security is bad. But there is no authority for that; on the contrary every lawful power may be delegated to another. (TROPLONG, *Mandat.* § 329.) At least this is the general rule, and there was nothing special or peculiar in the case here.

By the deed of tenth day of October 1854, special authority was given to Hervey to mortgage the Estates, but even if the power to mortgage had been defective, the subsequent ratification could have cured all defects. See DALLOZ. *Verbo* obligation. No. 4482, GILBERT on Codes.

So Hervey was really Chapman, and exercised all his powers.

The argument against the power of a Judge, in Chambers, to homologate the deliberations of a Family Council have been already anticipated. I need not dwell longer upon them.

But assuming that a nullity originally existed, have the deed not been completely ratified, over and over again, to cure any such defects? We have ratifications in a variety of forms. The conveyance to Laffan vested him with all the powers the parties themselves had. Since the powers given to Burnett, by George Chapman, authority to mortgage is expressly given. This clearly implies and includes authority to ratify previous mortgages. (See the cases in GILBERT, under article 1989 of the Civil Code.) The Schedule of the deed of sale enumerate the mortgages already existing in Mauritius. I need not repeat my argument, arising from the actual ratification and execution by payment, and the positive ratification by the deed of first December 1859. That last deed bears expressly that the obligation "a été en partie exécutée." I repeat that this ratification can't affect the rights of our opponents; they cannot challenge it. The last authority quoted against me was the decision in SIREY, 59. 1. 802. I concede the question there, indeed I would go much farther. The wife alone might, I think, ratify such a mortgage previously granted.

But the distinction is obvious. There, the husband had no right whatever, and therefore his ratification was worthless. See note p. 118. SIREY, 1867. SIREY 31. 2. 83. Ct of Paris.

SIREY. Year 10th p. 57. (75).

A Prodigal is much in the same position as a minor, as regards defect of power. See GILBERT *in loco.*

There is another authority, viz: SIREY 1839. 2. 5., but ours is as good as that. See SIREY 37. 1. 102, and what TROPLONG says on this, C. C. Art. 1338, and commentaries. The rights of third parties are safe when the nullities are absolute, but not when they are merely relative. If Overend Gurney & Co. wished to prevent this, they should have taken proper steps to prevent the ratification: *vigilantibus non dormientibus subvenient jura.*

The proceedings here are not in competent form for trying the validity of my mortgage. Our opponents ought to have insisted by a separate and independent suit. DURANTON v. 6, No 553. DALLOZ "Obligation" No. 940. SIREY 55. 1. 793. DEMOLHOMBE. 710. As creditors, they might have exercised the rights of their debtor. Arts. 1165 and following. The 18th Rule of Court which orders that every action shall begin with a Declaration has not been observed.

JUDGMENT.

The questions, between the parties to this suit, have arisen before the Master, in the course of the collocation of the creditors of Edward Chapman and Co., on the sale price of the Estate *Queen Victoria.*

Both parties hold mortgages on the lands. If there is no legal objection to their validity, these securities fall, of course, to be ranked or marshalled in the order of the dates of their inscriptions. *Prior tempore, potior jure.* is the rule of the Code, Art 2039. The date of inscription or registration of the hypothec, in all ordinary cases, fixes the security or preference thereby established.

In the present case the Inscription of the Mortgage of the Oriental Bank took place on 27th December 1854; that of Overend Guerney & Co., on 11th November 1857. *Prima facie*, therefore, the security of the Oriental Bank primes that of their opponents. The latter, accordingly, have undertaken to shew that, in law, the Mortgage of their competitors the Bank, is invalid, and must, so far at least as Overend Gurney and Co. are concerned, be struck out of the ranking.

The Master, on 19th July 1861, maintained certain of the objections of Overend Gurney and Co. to the validity of the Mortgage granted in favor of the Bank, and ordered that the provisional plan of the distribution of the sale price, which he had previously drawn up, giving a preference to Overend Gurney and Co. should be maintained, and that the *contredits* or objections of the Bank should be dismissed. This judgment was brought under the review of the Court by the Oriental Bank.

When the case first came before us, in December last, we pronounced the following Order: "That this case be remitted to the "Master, in order that he may, as soon as pos- "sible, allow parties to adduce whatever evi- "dence they may have to submit respectively "therein; the Master thereafter to hear par- "ties and to give such decision as he may "deem just and proper." (PISTON's Reports Vol. 1. p. 220.)

Five witnesses have been heard, before the Master. On resuming conduction of the case, that officer, on 27th February last, maintained his former order, and this judgment has been again brought up by Appeal. No motion has been made, by either party, to be allowed any further proof. The case therefore falls to be determined on the evidence as it now stands.

In the course of the elaborate discussion which the case has undergone before us, a variety of objections have been urged by the Respondents Overend Gurney and Co., the holders of the later mortgage, against the validity of the earlier mortgage, held by the Appellants the Bank. Of these, the following appear to be the most important, taking them in the order, rather of time or of their natural sequence, than of their apparent weight, or importance.

They may be thus stated:

1o. There is no *Acte authentique* to show that Edward Chapman, for his firm, was indebted to the Oriental Bank, as is alleged, and consequently there is no sufficient evidence to establish the claim of debt, and the relative mortgage pleaded upon by the Bank.

2o. George Chapman had no authority, as an emancipated minor, to give the power to Heivey to call a family Council, and mortgage the Estates. At least, very special powers of attorney should have been given for that purpose; as this was not done, the mortgage of the Bank, wanting a proper basis to rest upon, is null and void.

3o. There is no evidence that the deliberations of the Family Council, authorizing the mortgage in question, were ever homologated by any Judge of the Supreme Court sitting at chambers.

4o. Even if there were proof, that these deliberations were homologated, by a Judge at chambers, such homologation, not being that of the Court itself, is inept and ineffectual, in law.

5o. The inscription of the Bank is inept and null, as it does not shew, on its face, as is essential, the true characters and capacities in which Mr. Chapman was acting.

6o. It is farther null and void, in respect it contains no clear statement of the term, when the alleged debt was payable.

Before proceeding to notice these different objections, in their order, there are two points, one of a prejudicial or preliminary nature, and the other of an isolated and separate character, which may be disposed of in the outset.

I. It has been argued by the Appellants, the Oriental Bank, that the objections to their mortgage cannot be competently raised, in the present form; that if the Respondents Overend Gurney Co., seriously ment to impugn the validity of the Bank's security, they should have proceeded, in their challenge, by way of a separate suit, or "action principale." We do not think that this plea is a good one.

The questions here arise under "Ordre," in the distribution of the price of an immoveable Estate, sold by levy. The creditors are assembled to make good their preferences. In all ordinary cases of such competitions, the objections which the creditors may have to each others rights and claims, are admitted by way of exception, as incidents arising in the course of ranking or collocating the different creditors. To insist on separate and distinct actions to make good the different challenges of each others preferences, which they are by law entitled to advance, would lead to great and unnecessary delay and expense.

No doubt, it is quite possible to figure cases where a Court of law would require parties to establish their pleas, by way of separate and substantive suits, and would not permit the discussions to go on as mere incidents of the "Ordre." For example the right of a creditor might depend on the determination of a question of status, say: of marriage, of filiation or of legitimacy. It might be very advisable that persons in such a position should make good their status, in the ordinary legal form; by separate proceedings with which it would be improper to encumber and embarrass the proceedure in establishing the "Ordre."

But when the grounds of objection, as in the present case, depend on questions of the regularity and formality of the competing mortgages, it does not appear to us to be necessary to give effect to the plea of the Appellants, stated, it may be farther added, for the first time, at an advanced stage of the case, the success of which would add largely to the delay and expenses, without touching the merits of the questions between the parties.

II.—In the SECOND place the Appellants have maintained that, as George Chapman, according to their contention, was a *commerçant*, and engaged business as a partner in the house of Chapman & Co., he had all the powers of an emancipated minor, who engages in commerce, that is to say, in terms of C. C. Art. 487, he had, in his commercial dealings, the same powers as if he had been major. If this plea were well founded, a large portion of the objections against the mortgage of the Bank would be at once, swept away.—But without noticing the difficulties which the Appellants might have to meet, from the defective proof of George Chapman ever having been truly in law a *commerçant*, it is enough, to negative the plea, that we find that the preliminaries required by law, under Art. 2 of Commercial Code, to place an emancipated minor, engaged in commerce, in the position of a major, were not

observed. The Article runs thus: "Tout " mineur émancipé de l'un et l'autre sexe, " âgé de 18 ans accomplis, qui voudra profiter " de la faculté que lui accorde l'Art 487 du " Code Civil, de faire le commerce, ne pourra " en commencer les opérations, ni être réputé " majeur, quant aux engagements par lui con- " tractés pour faits de commerce,—1o. s'il n'a " été préalablement autorisé par son père, ou " par sa mère, en cas de décès, interdiction ou " absence du père, ou à défaut du père et de " la mère, par une délibération du Conseil de " Famille, homologuée par le Tribunal Civil. " 2o.—Si, en outre, l'acte d'autorisation n'a " été enregistré et affiché au tribunal de Com- " merce du lieu où le mineur veut établir son " domicile."

Admittedly, these requisites were not complied with. This plea of the Appellants must therefore fall to the ground.

Taking then the objections of the Respondents, to the mortgage of the Oriental Bank, in their order, we have now to consider: 1st. the effect of the want of any separate *Acte authentique* liquidating the amount of the alleged debt due by Edward Chapman and the firm, to the Bank.

Admittedly, no such document has been produced, but the *bona fides* of the demand of the Bank, so far as relates to the money having been truly advanced, for behalf of Edward Chapman or the firm, has not been very seriously disputed. The learned Council for the Respondents, when he stated that the question was one of mortgage, not of the existence of the respective debts, put the case on its right footing. The representative of Chapman have all along admitted the debt, large payments in reduction of the advances have been made, and the witness S. J. Douglas, who was the guardian of the emancipated minor George Chapman, has deposed: "having an intimate knowledgee of the affairs of the Estate of Edward Chapman, I am able to say that it would have been utterly impossible to carry on the cultivation of the Estates of Edward Chapman without these advances from the Oriental Bank, after his decease."

By law, the consent to grant a mortgage or hypothec itself, must be " *en forme authentique, devant deux notaires* " C. C. Art. 2127, and this regulation has been observed in the present case; but there is no necessity that the existence of the debt itself shall be evidenced by any separate writing, *en forme authentique.*

2.—The power of George Chapman, as an emancipated minor, to give the authority which he did to Hervey, is next disputed, but, we think, on grounds that are not sufficient. Assuming in the meantime and for the sake of the argument, that all was formally and correctly done, the emancipated minor had, by law, full authority himself to do all that he asked or authorized his attorney, or *mandataire* to do. The acts were, in themselves, quite lawful, and as a general rule of all jurisprudence, lawful powers of action, if not merely inherent in the person himself; can be devolved upon an agent or attorney. But it is said: Express powers to convene the family Council were not given to Hervey. But on the other hand, it must be remembered that positive and express authority was given to him, to mortgage the Estate. This, we hold, implied authority to execute all subordinate details, necessary for accomplishing the main object in view.

It is well said, by Mr. TROPLONG, " Mandat, " § 319. " Il reste à faire observer que ce " n'est pas aller au-delà de la procuration que " de faire certains actes qui, quoique non ex- " primés, y sont cependant virtuellement com- " pris, comme conséquents, antécédents et " compléments. On suppose que le mandant " n'a pas parlé de ces actes parce qu'il l'a " jugé inutile, ou bien parce qu'il n'y a " pas pensé, car, s'il y eût pensé, il en eût " imposé le devoir au mandataire. C'est ce " qu'enseigne le Président Favre sur la loi " 30, D, *Mandati.* " *Intelliguntur ea omnia* " *quæ credibile sit mandatorem in mandato* " *expressum fuisse, si de iis cogitasset.*"

3.—Is it proved that the deliberations of the family Council of 8th December 1854, were homologated by a Judge at Chambers?

The usual and, in ordinary cases, the only admissible proof of such a judicial act, is the production of the original Order of the Judge. But, in the present case, it is in evidence that the attorney who presented the *Præcipe* for the Order, and in whose custody it would naturally be, if it is in existence, left the Colony. " Some time after the year 1854." (Evidence of Honorable H. Kœnig.) and " that all the " papers left behind him, in his office, have " been searched with the greatest care, for the " missing document, but in vain; it could " not be found." (Ibid.) In this situation, secondary evidence of the existence and tenor of the writing has been adduced, and that evidence is of the following description:

1.—We have the original *proecipe* asking the Juge's Order. (quoted at length above, in the stotement of the facts of the case.)

2.—We have the fact of the entry of another *proecipe* presented, at the same time, in the only official record of these proceedings, kept, according to the practice of the period. The record is in the handwriting of the proper public officer, namely the Judge's Clerk. It bears that the Order was granted and paid for; and from the same identical figures, viz. No. 915, being endorsed, by the public officer in the *præcipe*, and in the Order Book, the two, nothwithstanding the entry in the latter of the name of the Estate which is not correct, are, we think, sufficiently connected and shown

to refer to the same matter. The record also centains the entry of the fee payable by the Attorney to the Judge's Clerk, when the former receives from the latter delivery of the Judge's Order. The money is given in exchange for the order and *unico contextu*. This Book expressly states that the matter of the applications for homologation of Family Councils, in the affairs of Widow Chapman & others, (there were no other Family Councils,) were referred to the " Ministère Public ". Looking then at the whole *res gesta*, names, dates, figures, &a., the evidence that the Judge's Order was given legally, in terms of the *præcipe* is very strong. But farther we have the following deposition of the learned Judge (Sir Edward Rémono) before whom the proceedings (whatever they were) took place.

" I have seen in the Order Book, kept by my clerk, an entry of two homolgations, made by me, at chambers, of two Family Councils relative to the minor Chapman. I have a personal recollection of Mr. Terry having applied for the Orders, homolgation, and that he was very anxious to obtain them, and that I granted them to him. These Orders were obtained after having the written opinion of the " Ministère public." I am certain that this was done ; otherwise I would not have granted the Order ; and Mr. Hugnin, my clerk at that time, was very careful in not drawing up an Order, untill all the formalities were fulfilled.

" The two original *præcipes* for obtaining the homologation presented to me, dated 18th Dec. 1854, are in the handwritting of Mr. Terry.

" The Orders of Homologation have been delivered conformably to the *præcipes*, no opposition having been made by any one ; there could have been no reason for any change being made.

"I infer from the Nos. affixed to the *præcipes* Nos. 915 & 916, the Books agreeing, that the Nos. on the Books are the entries of the Orders del ivered on the said prœcipes. These entries are made by my clerk, for the checking, by the Audit Officer, of the sums received ; and no entry is made until the Order be delivered and paid for.

" The two *præcipes*, like all other *præcipes*, remained at my Chambers, as minutes of my proceedings ; they are the only record on which a fresh Order could be drawn up, and are the only materials on which the original Order is drawn up ; the Order being in such case merely an echo of the *præcipe*."

In such circumstances, we cannot accede to the propositions of the Respondents, Messrs. Overend Gurney and Co, that there is no proof of the homologation, by a Judge of the Supreme Court sitting at chambers.

It was argued by these parties, that to admit parole evidence, here, would be to substitute that inferior species of proof for the only admissible evidence in law, viz : the written Order of the Judge. But this is a misstatement of the true position of the question. By admitting the secondary evidence here, we do not substitute it for the Judge's written Order, we merely allow it to be given (the non-production of the best evidence being accounted for), to instruct that the Judge's written Order, was really given, and did, at one time exist. It is a rule of evidence in every legal system, with which we hav e any acquaintance, that in such a case as this, when the best evidence of a fact has perished, secondary proof must be admitted, otherwise the just rights of parties, without any fault of their own, would frequently be entirely sacrificed.

4.—But, in the next place, let us now inquire wether a Judge at chambers could, in 1854, competently homologate the deliberations of a Family Council ?

Prior to the year 1851, when the Supreme Court of this Colony was established on its present footing, the homologation of the deliberations of Family Councils was part of the duty of the Court of First Instance. The matter was regulated by Art. 458 of the Code Civil ; it is in these terms :

" Les délibérations du Conseil de Famille, " relatives à cet objet, ne seront exécutées " qu'après que le tuteur en aura demandé et " obtenu l'homologation devant le tribunal " de première Instance, qui y statuera, en " la chambre du Conseil, et après avoir enten- " du le Procureur Impérial."

The mode of procedure in Mauritius, under this Article, we learn from the evidence of the witness Versange Delainé, was as follows :

" During the existence of the Court of First Instance the President alone composed the Court. The presence of the Suppléant Judge of the Court of First Instance was not necessary to compose the Court at its sittings. The presence of the " Ministère public " was necessary, as well as the Registrar's, at a sitting of the Court.

" In matters of reference, " référé," before the President in chambers, the Registrar was always present. The presence of the " Ministère Public " was not required at them.

" The Orders for homologation of the Family Assemblies were never signed by the Registrar. They were generally made by the President, without the assistance of the Registrar, after verifying the communication to the " Ministère Public," at his private chambers, at his dwelling house in Corderie street.

" They were returned regularly, every morning, to the Registrar."

By the Royal Order in Council of 20th October 1851, (Art. 5) the Court of First Instance is abolished and, by Article 2, the present Supreme Court is established, with all the powers, authority and jurisdiction of the Court of Queen's Bench in England. It also sits as a Court of Equity. (Art. 3.) It would appear that the practice, as to the homologation of deliberations of Family Councils, since the institution of the new Court, has not been quite uniform. Sir Edward Rémono deposes: "Since the suppression of the Court of First "Instance, in 1852, the homologation of "" Conseils de Famille," when there was no "discussion between parties, was always made "before a Judge at chambers. In cases of "difficulty, I always refer parties to the "Court."

The witness *J. H. Ackroyd* deposes:

"Before being an attorney I was, during "three years, Judge's clerk, from the beginning of the year 1855. The practice to obtain "the homologation of an assembly of relations, when I was Judge's clerk, was to "make an application to a Judge at chambers, "and to file with the Judge a prœcipe, in the "form of the two "Prœcipes" in the record, "and to produce an office copy of the family "Council. Upon this application, reference "was made to the "Ministère Public," and "the final Order was decided upon, only after "the "Ministère Public's" answer was produced. After consulting the Books of Mr. "Justice Bestel, I find that, during the time "I was his clerk, and prior to the passing of "the Ordinance on the jurisdiction of a Judge "at chambers, no Order of homologation, by "him, of any Family Council is given or "mentioned on the said Books.

Examined by the Master: "Since the "passing of the Ordinance of 1855, I find "entered in the Books several Orders for the "homologation of Family Councils which "were obtained in the manner above mentioned.—The *prœcipe* was kept and numbered, as the materials on which the Order was "framed, and on which a fresh Order, in case "of need, might be obtained; mention of the "reference to the "Ministère Public" is not "made on the *prœcipe*, but is entered in the "Book where all orders are noted down. As "a Rule strictly adhered to, no Order was "given after the reference made to the "Ministère Public" unless the answer of this "latter be produced to the Judge."

On the other hand, the Respondents have produced, from the records of this Court, during the period in question, several exemples of the homologation, by the Court itself, of the deliberations of Family Councils, there does not appear to have been any opposition.

It appears to us that, after the changes in the constitution of the Courts, the practice of resorting to the Judge, sitting at Chambers, for the homologation of the proceedings of Family Councils was quite competent. A Judge at Chambers represents the Court itself in matters requiring dispatch. He sits at his official Chambers, at the Tribunal, not in his own private residence. In the vast majority of such cases the homologation is a matter of course, and to keep parties waiting during the vacations would be attended, in many cases, not only with great inconvenience, but with positive injustice and loss. Therefore, as regards competency of the Judge, celerity of procedure, and convenience of business, we do not think that any thing serious can be alleged against the procedure which was adopted. But it is said that the passing of the Ord. No. 24 of 1855 is incons istent with this view, as the powers of a Judge at Chambers were then intended, for the first time, to the affirmations of deliberations of Family Councils (§ 2 and Schedule).

It does not appear to us that this is a correct exposition of the law. If it were so, it would follow that all the homologations, in the intervals from 1851 to 1855, would be null and void, which would have necessarily a very serious result. No doubt if the words of the Ordinance cleary supported the Respondents contention, it might be impossible to listen to any argument *ab inconvenienti.*

But do the terms of the new law support this position? We think not. The rubric, so far as it relates to the matter now under discussion, is merely this: "An Ordinance for "removal of doubts touching the Jurisdiction "of the Supreme Court, in small causes, and "for facilitating and promoting the despatch "of business at Chambers and for the removal "of doubts touching the same."

The preamble runs thus:

"Whereas doubts may arise, as to the Jurisdiction of the Supreme Court, in suits and "demands, wherein the subject in litigation "does not exceed £ 100, and which shall not "be within the competency of the District "Magistrate; and it is expedient to remove "such doubts; and whereas it is expedient to "facilitate and promote the despatch of business before a Judge at Chambers, and to "remove doubts touching the Jurisdiction of a "Judge at Chambers, in certain matters."

And then we have the sections following:

"Art. 1.—It is hereby declared that whenever the principal cause of action, exclusive "of interest and costs, does not exceed in value £ 100, the Court, held before a single "Judge, is competent to take cognizance of "the same.

"Art. 2. The matters set out in the Schedule to this Ordinance annexed may, subject "to the discretion of the Judge, in any particular case, to refer the same to the Court,

" be henceforth finally disposed of, at Cham-
" bers, by a Judge's Order, which Order shall
" be a sufficient authority, to the Registrar of
" the Court, to issue thereon a Rule of Court
" *de plano*.

" Art: 3. It is hereby declared that all mat-
" ters, upon which a Judge's Order or autho-
" rity was formerly required from the Presi-
" dent of the Court of First Instance, or Pre-
" sident of the Court of Appeal, previous to
" the introduction of any action before either
" Court, and all matters which were settled
" at Chambers before the President of either
" Court (other than matters in which Juris-
" diction may have been given exclusively to
" the District Magistrate) are within the com-
" petence of a Judge of the Supreme Court."

The purpose of the legislature was merely to remove doubts which may arise, as to certain matters, and it therefore declares so and so. The enactments, so far as relates to the matters here in dispute, appear to us to be declaratory of what the law really was, at the time. It is said that, by a fundamental law of the Colony, no enactment can have a retrospective effect. (C. C. Article 2.) As a general rule this is quite true, on all legal systems, though perhaps it is not unworthy of remark, that there is scarcely an article, in the whole Code, which has given rise to more discussion. It is obvious that a new law, expressed in the ordinary enacting terms, cannot have any retrospective activity; but to say that the legislature cannot pass a law to remove doubts, and to declare what the law really is, would be to impair the plenitude of the legislature's power.

5o.—It is said the capacities in which Mrs Chapman was acting were not set forth with sufficient distinctness, in the inscription. But really it appears to us that the recital is both full and specific.

" Mary Jane Burnett, now absent from this
" Colony, and the widow of the late the Ho-
" norable Edward Chapman, late member of
" the Council of Government and merchant,
" in this Colony; the said Widow Chapman,
" acting as sole executrix and as legatee of the
" said late the Honorable Edward Chapman,
" her husband deceased, as per his will bear-
" ing date third and fifth June, now last past,
" and filed in the Office of Mr. notary Guim-
" beau, as per deed drawn up before him and
" his fellow, on fifth July, now last past, and
" registered on the same day, in Reg. A. 108
" No. 3862; and the aforesaid widow Chapman
" further acting as heiress of the late Mary
" Georgina Chapman, her daughter, deceased
" subsequent to the death of her father."

6o.—It is argued that there is no date of *exigibilité*. This unquestionably is required by law. But, on the face of the deed, it is said that the mortgage is granted for the reimbursement of all sums already due and owing. This shows that, even at the date of the writing, the amount was truly due and exigible, and delay was only given on securities for payment being granted.

From the views taken by the Court, in this case, it is not necessary to determine some very important and interesting questions which have been debated before us, among others the effect of the ratification, by the minor, after majority, of the hypothec granted by him or his attornies, in minority. As, however, it is not improbable that the case may be taken to a Superior Court, it may not be improper for us to indicate, very briefly, what our views might have been on that question, had we been called upon to decide it.

From the array of authorities on both sides quoted, in the course of the argument, it will be seen that the point is one of difficulty and has given rise to great diversity of opinion, among the ablest of the French Lawyers. *Multum sudant Doctores.*

With every respect for these writers who express the opposite view, we think that the opinion of those who refuse a retrospective effect to such deeds of ratification, so far as relates to third parties, such as later creditors by hypothec, is the correct one. We found our opinion chiefly on the following considerations:

1.—The express words of Article 1338, that ratifications shall take effect, "sans préjudice néanmoins du droit des tiers.

2.—That such subsequent ratification is, as to the later creditor, a *res inter alios*, by which, according to the general rule of law, his interest ought not to be affected.

3.—That the granter of the deed should not have it in his power, by any act of his own, to promote the interests of a creditor at the expense of those of another.

4.—That the distinction of " nullités absolues" and "nullités relatives" on which the solution of the question is said, by many writers, to depend, is not mentioned in the law itself, which, when we get beyond deeds absolutely null and void as being opposed to morality or positive law, is itself, one, in many cases, of a very nice and metaphysical nature, and not satisfactory for the practical decision of causes.

5o.—That the principle of recroactive effect given to deeds, is itself contrary to general equity, and is made to depend on what is unusually termed a fiction of law. These fictions, we think, ought to be restrained, as much as possible, and not enlarged.

On the whole matter, therefore, the Court orders and decrees, that the Judgment of the Master, of dates 19th July 1861, and 27th February 1862, be recalled and that the Mortgage inscription of the Appellants, the Oriental Bank shall have a priority over that of the Respondents Overend Gurney and Co., in the distribution of the sale price of the *Queen Victoria* Estate.

Costs to the Appellants.

SUPREME COURT.

VENTE DE MARCHANDISES,— CONTESTATIONS ENTRE COMMERÇANS,—RENVOI DEVANT LE MASTER.

Un compte acquitté ne prouve pas le paiement d'un compte, d'une date antérieure, entre les mêmes parties.

SALE OF GOODS,—CONTESTATIONS BETWEEN TRADERS,—REMIT BEFORE THE MASTER.

A acquittanced account is not proof of payment of an account, of anterior date, between the same parties.

Number of Record, 7250.

P. A. WIÉHÉ & Co.,
Plaintiffs.

versus.

FÉBURE MARTIAL,
Defendant.

Before:

His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2d P. J.

A. LEGALL,—of Counsel for Plaintiffs,
J. H. ACKROYD,—Plaintiffs' Attorney.
G. B. COLIN,—of Counsel for Defendant.
A. J. COLIN,—Defendant's Attorney.

24th July, 1862.

The sum of $749.82 ¢ is demanded, by the Plaintiffs, in this action, from the Defendant, for goods sold and delivered to him, from the fourth July to tenth August 1861.

The defence to the action is a formal denial of the sale and delivery of the goods in question.

In support of this denial two receipts were put in, of an anterior date to that of the account produced by the Plaintiffs, proving payment, by the Defendant to the Plaintiffs, of two sums, one of $30.17 ¢, on the same day, for goods of a similar description as those enumerated in Plaintiffs' account.

Another receipt was also put in, by Defendant, of a subsequent date to that of the account produced, shewing payment by him, on the sixth September 1861, of a sum of $25.11 ¢, for goods of a like description as claimed in this case.

Hence the improbability, it was contended, of Plaintiffs having supplied the goods, borne in the account, from the fourth July to tenth August 1861, and to the large amount of $49.82 ¢.

It was further stated that, by the Defendant's books, the Court has the evidence of purchases, by the Defendant from other parties, of goods, of a similar description as those claimed, pending the time wherein the goods, payment for which is now demanded, are alleged to have been sold and delivered by the Plaintiffs.

The facts alleged by the Defendant were not denied by the Plaintiffs, who accounted for the sum received, subsequently to the date of the supplies borne on the account, by the two fold allegation that, on the non payment of the amount of the account sued upon, credit was refused to the Defendant, and that on his subsequent application for the goods paid for in September 1861, he had been told that no goods should henceforth and until payment of the account, be delivered to him, except on immediate payment, upon which Defendant paid the sum of $25.11 ¢, in September, for the goods then purchased by, and delivered to him.

It was also admitted, by the Plaintiffs, that the Defendant's books might lead to the inference that he had supplied himself elsewhere during the space of time borne on the Plaintiffs, account; but that he had so supplied himself also from the Plaintiffs' store was apparent from the entries in the Plaintiffs' books, of which the account produced is but the reproduction.

The books of Plaintiffs, not being in Court, and with the view of delaying the decision of this case as little as possible, the Court referred the matter to the Master, that he should examine the Books of both parties, and report, within eight days, on the correctness of the facts alleged on both sides.

However, the Master has merely reported that: "The entries of the several items "mentioned in the Plaintiffs' Bill of particu- "lars, dated 10th August 1861, are correct "and duly made in the Store Keepers' book, "and the Day Book of the said Firm, and "that no such entry of payment appears in "the Cash Book."

"That although preceding and subsequent "entries of goods received by the Defendant, "and of his dealings with the Plaintiffs, "exist in the Book of entries, kept by the "Defendant, none whatsoever appear of the "dates given in the Plaintiffs' said Bill of "particulars."

Thus the Court is left in much the same position as before, but must nevertheless proceed to judgment.

No writing of any kind intervened, on occasion of the alleged sale and delivery of the articles set forth in the account.

The Defendant has adduced but one witness whose evidence is merely of a negative character.

On the other hand the Plaintiffs have adduced the evidence of three witnesses, whose testimony of an affirmative and positive character cannot, in the opinion of the Court, be resisted.

Therefore Judgment for Plaintiffs with costs. Interest at 12 per cent. Arrest in execution. Imprisonment limited to three years.

Bail Court.

APPEL D'UN JUGEMENT DU MAGISTRAT DE DISTRICT,—LOUAGE D'OUVRAGE,—CONTESTATIONS SUR LE PRIX DU TRAVAIL,—JUGEMENT PAR DÉFAUT,—"NEW TRIAL,"—APPEL,—RENVOI DE LA CAUSE DEVANT LE MAGISTRAT,—PROCÉDURE,—SERMENT SUPPLÉTOIRE,—ORD. No. 34 DE 1852,—C. C. ARTS 1366 ET 1367.

Sur une demande en paiement, faite pour certains travaux de constructions ou de répations, le contrat ayant été admis, et le montant du compte contesté, et les preuves invoquées par le demandeur étant d'une certaine importance, bien qu'elles ne fussent pas complètes, la Cour a déféré au demandeur le serment supplétoire.

La Procédure prescrite par les Ordonnances sur la Magistrature de District doit être rigoureusement observée par les Magistrats.

APPEAL FROM JUDGMENT OF DISTICT MAGISTRATE,—WORK AND LABOUR DONE,—CONTESTATIONS FOR THE PRICE OF WORKS,—JUDGMENT BY DEFAULT,—NEW TRIAL,—APPEAL,—REMIT OF THE CASE TO THE DISTRICT MAGISTRATE,—PROCEDURE,—SUPPLETORY OATH,—ORD. 34 OF 1852,—C. C. ARTS 1366, & 1367.

When, under a demand for payment of an account for carpenter's work, the contract generally was admitted, but the amount of work actually performed, and its value was denied, and the Plaintiff had adduced a considerable amount of evidence, though not complete proof, the Court allowed the Plaintiff to take the suppletory oath.

The formalities of procedure required by the District Ordinances should be strictly followed by the Magistrate.

Number of Record: 289

BANGARD, Appellant.
versus
DESMAZURES, Respondent.

Before:
His Honor the CHIEF JUDGE.

G. B. COLIN,—Of Counsel for Appellant.
J. GEO. TESSIER,—Appellant's Attorney.
E. BAZIRE,—Of Counsel for Respondent.
C. GAUTRAY,—Respondent's Attorney.

24th July 1862.

This was an Appeal from a Judgment of the District Magistrate of Grand Port, sitting on the Civil side. The original demand was for the sum of $207.16 c. amount of certain carpenter's work, executed for the Defendant Desmazures, at the "Etablissement Marre d'Albert." The work generally was not disputed, but the price, and the precise amount actually performed were denied.

At the first hearing, the Plaintiff called one witness, who deposed that the prices charged were correct, but he could not speak to the amount of work done. The case was then delayed, at the request of the Defendant, that he might get, from the Plaintiff, a note of particulars, and have an opportunity of citing witnesses. The case stood over for one month.

When it next came on, the Defendant did not appear, and Judgment went against him by default.

On his Petition, stating that he had never received a copy of the account, that he did not know the precise day of the trial, and therefore praying for a New trial, the Defendant was allowed a new Trial, under the conditions "prescribed by the Rules of Court."

On the day fixed, the Plaintiff appeared alone in support of his claim. The Defendant was assisted by an Attorney or an Attorney's Clerk. Four witnesses and the Defendant himself were examined on his behalf. The statements of those parties were conflicting. The learned Magistrate "dismissed the demand with costs against the Plaintiff, in as "much as the Plaintiff has not proved his "claim to the satisfaction of the Court."

The Plaintiff Appealed.

G. B. COLIN, for Appellant: Substantial injustice has been done, in this case, to my client, a poor trades man, contending with a rich proprietor. The long delays, particularly after the proof had begun, should not have been granted. The Plaintiff standing in Court alone did not contend, on equal terms, against the Defendant, a man of education, who was also allowed the assistance of a Counsel. As the only real point in dispute was the price at which the work was to be done, a remit should have been made, at once, to an appraiser; or the Plaintiffs' oath should have been taken; that was the course followed, by this Court, in the very similar case of *Grandison versus Lalouette*. Fourth July 1845. (BRUZEAUD'S *Reports*. Page. 80.) At all events the Judgment dismissing the case should not have been pronounced; that amounts to a *chose jugée*; a nonsuit should have been entered.

BAZIRE, for Respondent: The argument on the other side, is built entirely on fanciful grounds arising from the alleged disparity in position of the parties. Courts of Justice have nothing to do with such sentimental arguments. The Appellant must shew good reasons in law not mere fancies, before the Judgment standing in my favor may be upset. The account founded on is entitled as follows:

"Etablissement Marre d'Albert doit à "Célidor Bangard, d'après Jugement rendu le "vingt-un Décembre dernier, par la Cour de "district du Grand Port, pour solde de "réglement."

But no Record of any such alleged Judgment, was produced in the Court below. So the very foundation of the claim was wanting. There are no real grounds of Appeal, as the Magistrate has the fullest authority to grant a New Trial, when he thinks it conducive to the ends of Justice: Ordinance No. 34 of 1852. *Section* 36.

COLIN, in reply: If the Defendant wanted to inspect the Judgment of the Court, referred to in the account claimed, he had only to ask for it. It had really nothing to do with the case, and was only referred to by my client, in his ignorance. The whole of the proceedings and the examination of the new witness was quite a surprise against my client, and he had no knowledge of his position, enabling him to resist those proceedings. The case should have gone to "Experts;" or the Plaintiff's *serment supplétoire* should have been allowed. (C. C. 1066. and following Articles.) There was no room at all for a dismissal of the case.

HIS HONOR THE CHIEF JUDGE: There certainly have been considerable delay in proceeding with this case, and these may have borne hard on the Appellant, who resides at a long distance from the District Court. But the learned Magistrate below granted those delays, in the exercise of his discretion that they were necessary for the due determination of the rights of parties. But the Defendant's first motion for delay should have been made, before the Plaintiff's proof commenced; and had the precise enactments and schedules, regulating the subsequent proceedings, been more specially looked at, the later delays would probably not have been so great. Seeing that the Defendant admitted the contract and that the only question was the amount of work done and its value, the Judgment dismissing the case altogether will require to be recalled. The decisions, both of the Court of First Instance and the Court of Appeal, in *Grandisson versus Lalouette*, are not without their bearing here, and the Court is of opinion, looking at the state of the case, on the evidence already adduced, that a similar Judgment will meet the Justice of the present suit.

The demand, though not altogether established in evidence is very far indeed from being destitute of proof: C. C. 1363, 1367. Pothier, Traité des obligations, V. 2, No. 923.

The Judgment appealed against is therefore recalled, and the case remitted to the District Court, that the oath of the Plaintiff Bangard may be taken, to the truth and exactitude of his account as to the amount of work actually executed and its value. All questions of costs reserved in the meantime, and to be disposed of by the District Magistrate, after the oath is taken.

Bail Court.

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT (PARTIE CRIMINELLE,)—POSSESSION D'OBJETS VOLÉS PAR L'ACCUSÉ,—RECEL,—VALIDITÉ DU JUGEMENT LORSQU'IL N'EST PAS RENDU A LA REQUÊTE DE LA PARTIE CIVILE,—ART. 40 ET 310 DU C. P.

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE (CRIMINAL SIDE,)—POSSESSION OF STOLEN OBJECTS BY THE PARTY CHARGED,—SECRETING STOLEN OBJECTS,—VALIDITY OF CONVICTION WHEN IT IS NOT DELIVERED IN THE NAME OF THE OWNER OF SUCH OBJECTS,—ART. 40 AND 310 OF THE COLONIAL P. C.

Number of Record: 146

SAPARMUTH,—Appellant.
versus.
THE QUEEN,—Respondent.

Before:
The Honorable N. G. BESTEL 2d P. J.

V. NAZ,—Of Counsel of Appellant.
J. GEO. TESSIER,—Appellant's Attorney.
S. J. DOUGLAS,—Subs. Proc. & Adv General.
J. BOUCHET,—Queen's Attorney.

15*th August* 1862.

On this Appeal being called for hearnig, NAZ, of Counsel for the Appellant, confined his argument to the first ground of Appeal namely:

That the Conviction was bad in law. Bad, it was contended, 1st. Because the Information had not been lodged by the *Owner* of the articles said to have been secreted by the Appellant, but by a *third party*,—2ndly. Because of the variance existing between the Conviction and the Information, the latter charging a purchase, by the Appellant, of the goods alleged to have been stolen, and the Conviction of the Appellant, for the offence with which he stood charged, leading by the quotation of Article 40 and 310 of the Penal Code, to the inference that the Appellant was guilty of being in possession of stolen goods, either knowingly or without sufficient excuse or justification.

In support of the 1st objection, disputed by the Crown Counsel, no authority was cited to shew that it was necessary, in the case before the Court, that the complaint should be laid by *the owner, in person.*

The Rule on this point is, that "in some "cases of injury to private property, where "the *penalty* is intended as a *Compensation* "to *the owner*, and in which the *dissent* of "the *owner* is *essential* to the offence, (as on "the former Statute of 5th Geo. 3 C. 14.)

" for the protection of private fisheries, it is " requisite that either the Complaints should " be made *on behalf* of the owner, or some " other proof of his dissent adduced along " with the charge, altho, the Statute itself " may not profess in terms, to make that a " condition ; for unless it appears that the " owner dissented to act, it does not " amount to an offence. It is now therefore " settled that, in every *Conviction* of this na- " ture, it must be *distinctly* stated in the *In- " formation* and in the *evidence*, that the pro- " ceeding before the Magistrate is at the " instance of the owner." (Paley on Convict : Page 33.)

And altho' it was unnecessary in this case, yet the Informer, in this instance, is stated to have acted on behalf of the owner of the goods found in the possession of the party charged, as if foreseeing and anxious to rebut this very objection to its insufficiency in law.

The 2d objection against the validity of the Conviction, namely : the variance between the Conviction and Information, as to the nature of the offence was also disputed by the Crown Counsel, who contended that some of the bags alleged to have been empty, when they reached the possession of Appellant, were full ; that whether the goods reached the Appellant's possession by purchase, or as bailee, was immaterial. His guilty knowledge, in either case, is proved by the secreting of some of the bags and contents, and of the abuse made by him of the trust reposed in him by the original and principal offender.

Article. 40 of our Colonial Penal Code corresponds with. Article. 62 of the Penal Code of France ; on reference to wich I find the following note. (Code Pénal annoté par Gilbert, Art : 62 note 6.) " La loi n'exige " point que le recéleur ait profité de la chose " qu'il a reçue. La circonstance que le préve- " nu de recelé a reçu, en simple dépot, la cho- " se volée, ou même en a payé le prix, n'al- " tererait donc point le caractère criminel du " recelé.

(Chauveau et Hélie. Volume. 1 Page 435. 3d Edition.)

The offence contemplated by the legislature of France and of this Colony, is " knowingly receiving and secreting the stolen goods." Whether the goods reach the receiver by the purchase from, or as bailee of, the principal offender is immaterial, as in both cases, having possession of the goods he must necessarily account, in a satisfactory manner, for such possession.

The two objections urged against the illegality of the Conviction cannot therefore be allowed. The other reasons assigned, such as the want of evidence, &a., in support of the conviction, are matters which the Court ought not to entertain. There was in this case sufficient evidence to go to a Jury. The Judge, upon the evidence adduced on both sides, having given a Verdict against the Appellant, the Conviction must be and is accordingly supported.

Appeal accordingly dismissed with costs.

Bail Court,

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—LORSQUE L'INTIMÉ LAISSE DÉFAUT LE JUGEMENT DONT IL EST FAIT APPEL SERA ANNULÉ SANS EXAMEN.

APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE,—IN AN APPEAL WHEN NO ONE APPEARS TO SUPPORT THE JUDGMENT OF THE COURT BELOW, IT WILL, AT ONCE, BE QUASHED.

Number of Record : 284

HOSSEN,—Appellant.
versus.
NARAIN,—Respondent.

Before :
His Honor The CHIEF JUDGE.

C. M. CAMPBELL,—Of Counsel for Appellant.
W. FINNISS,—Appellant's Attorney.

18*th June* 1862.

This was an Appeal from the District Court of Savanne, Civil Side,

CAMPBELL for Appellant : The Plaint here, was founded on an alleged promissory note, partly written, and particularly the signatures, in Oriental characters. No proof whatever was given of the true import of those characters, by translation, either into English or French. The Judgment is therefore null and void.

HIS HONOR THE CHIEF JUDGE. It is enough that no one appears to support the Judgment of the Court below. All the formalities of Appeal appear to have been duly observed.

Judgment quashed, with costs.

Bail Court.

LOUAGE D'OUVRAGE,—CONTESTATIONS SUR LE PRIX ET LA QUALITÉ DES TRAVAUX,—DÉFAUT D'EXPERTISE.

WORK AND LABOUR DONE,—CONTESTATIONS AS TO THE PRICE AND QUALITY OF WORK,—WANT OF SURVEY.

Number of Record : 3144

BERGER,—Plaintiff.
versus,
LEDEAUT,—Defendant.
Before :
The Honorable N. G. Bestel 2d P. J.

J. Rouillard,—Of Counsel for Plaintiff.
E. G. de St Perne,—Plaintiff's Attorney
L. Rouillard,—Of Counsel for Defendant.
E. Boullé,—Defendant's Attorney.

5th August 1862.

In this case the Plaintiff claims from the Defendant, payment of the sum of $319.50, being the amount of the balance of an account of $472, for certain repairs made, at Defendant's request, to her house, situate at Champ de Mars, and set out in an agreement under private signatures, dated the twenty eighth May 1861 ; and also for the repairing of an out house, on the same premises.

The defence is : 1st. The badness of the work done, and 2ndly. The absence of any agreement as to the repairs of the "pavillon."

The reply is that, had the work done been as bad as alleged, it was the duty of the Defendant to have objected to it, and to have had it surveyed by competent men, immediately upon, or very soon after notice to her of the completion of such work, and not to have waited until payment was demanded to take the objection now brought forward.

To the 2nd objection, namely : The absence of any written agreement as to the repairs of the "pavillon," it has been answered that the sum claimed, is so trifling, that it is hardly worth while to insist on that part of the demand referring to it.

JUDGMENT.

The evidence, in this case, shews that the Defendant visited the premises during the progress of the repairs of her house ; had she been dissatisfied with the work done, it was her duty to have it surveyed, when told of the completion of the work. Nothing would have been easier, at that stage of matters, than to ascertain the worth of the objection and plea now set up. Instead of this the works now complained of were accepted by her. The house was let, by her, first as an hotel during the race week, and subsequently for a school to one Gustave Dumée ; the truth of the allegation of the badness of the work done, could not be ascertained, after the time elapsed since the completion of the work objected to at this late hour. This of itself is a sufficient ground for overruling the objection set up to the demand.

Judgment therefore must go for Plaintiff, for the sum of $ 307.50 c. instead of $ 319.50 c. claimed. Costs against the said Defendant.

Bail Court.

Imputation de paiement,—C. C. Arts. 1253 et 1256.

Le paiement, fait par le débiteur, de deux dettes également échues, dont l'une est cautionnée, doit être imputé sur la dette cautionnée.

Imputation of payments,—C. C. Arts. 1253 and 1256.

An indefinite payment made by a debtor in two sums, one of which is cautioned, the other is not, is applied to the sum which is guaranteed.

Number of Record : 283

Before :
His Honor the Chief Judge.

CHARON, Plaintiff.
Versus.
LEISHMAN & Co., Defendants.

C. M. Campbell,—of Counsel for Appellant.
P. N. Charon, —Attorney for himself.
J. Rouillard,—Of Counsel for Respondents.
E. G. de St. Perne.—Respondent's Attorney.

24th July 1862.

This was an Appeal from a Judgment of the Senior District Magistrate of Port Louis. The case was partly argued, some weeks ago, but owing to the unavoidable absence of Counsel, the discussion was only closed the other day.

The facts were these. On 27th June 1859 the Respondents Leishman and Company sold to F. Gallanty "50 (cinquante) balles riz Mooghy à $ 4 10 ¢ la balle, esc. 6 o/o." On the 27th June they delivered to Gallanty the rice, and certain additional bags, for the same price, amounting altogether to eighty bags, the whole price being $ 325.75.

On the same date 29th the Appellant Charon granted to Leishman and Co. the following guarantee : "Je garantis le paiement de 50 balles de riz vendues à M. F. Gallanty."

On 3rd August thereafter, Gallanty paid $ 75 to Leishman and Co, to account generally, without any imputation or appropriation of the payment. No receipt appears to have been given for the money. It was placed generally to the credit of the whole debt, and according to this mode of payment the sum of $250.75 still remained.

On 14th February 1860, Judgment, was

taken, in the Supreme Court, against Gallanty, for this sum of $250.75, with interest and Costs. The amount not being paid, execution issued, and a return of Nulla Bona was made by the usher.

In February last, the present suit was raised, in the District Court of Port Louis, against Charon, on his guarantee, Leishman & Co. claiming payment of 205 dollars as the price of the 50 bags of rice covered by his guarantee. The learned Magistrate's Judgment was against Charon, with interest and costs, on the ground "that there is only one debt due "of which the Defendant guaranteed a part."

Under the Appeal, CAMPBELL, for Charon, argued:

This is a case of money paid to a creditor by a debtor in more obligations than one, without the debtor saying how he wished the payment to be applied. Certain rules have been laid down, in the Code, for the regulation of such cases. See C. C. Arts. 1253 and following. In particular, by article 1256, it is enacted: "Lorsque la quittance "ne porte aucune imputation, le paiement "doit être imputé sur la dette que le débiteur "avait, pour lors, le plus d'intérêt d'acquitter "entre celles qui sont pareillement échues; "sinon, sur la dette échue, quoique moins "onéreuse que celles qui ne le sont point. Si "les dettes sont d'égale nature, l'imputation se "fait sur la plus ancienne; toutes choses éga-"les, elle se fait proportionellement."

This article applies directly, as the debtor had a greater interest to pay the debt which was cautioned, than the debt not cautioned, as by paying the former, he discharged two creditors at once. See MARCADÉ. IV. Page 554. TOULLIER. VII. Page 252.

ROUILLARD, for Respondents, Leishman and Co: This is a new point which was not raised in the Court below. It cannot, therefore, be competently argued, according to the constitution of the Courts. LLOYD'S Practice of County Courts. Page 206. The sale and the guarantee were quite separate. We exhausted every possible remedy, before taking steps against Charon, and we have given credit for all the money we got.

CAMPBELL, in reply. The point was mooted before the District Court. I stated it as soon as I saw, from the documents put in, how the case really stood. It cannot be expected that the notes of the Judge below can contain a full record of every thing that takes place.

HIS HONOR THE CHIEF JUDGE: I think we may fairly gather, from the notes of the learned Juge in the Court below, that the point was before him, for the decision is put on the ground "that there is only one debt, "of which the Defendant guaranteed a part," and so reasoning, he arrived at the conclusion, that whatever part of the rice was not paid by Gallanty, Charon was bound to pay, up to the amount of the price of 50 bags.

The case does not strike this Court in precisely the same light. It will be remarked that the present suit is one entirely between MM. Leishman and Co. and Mr. Charon, and must be decided on the *vincula juris* established between them whatever these may be. The position of a cautioner is always, in the eye of law, a favourable one, his obligation will not be extended beyond the precise limits of the words used, Civil Code 2015. "Le caution-"nement ne se présume point: il doit être "exprès, et on ne peut pas l'étendre au delà "des limites, dans lesquelles il a été con-"tracté."

Again an obligation of cautionry is merely supplementary to the principal contract, as the cautioner can only be called on to pay, if the principal debtor himself fails to do so. C. C. article 2011 "Celui qui se rend caution "d'une obligation, se soumet, envers le cré-"ancier, à satisfaire à cette obligation, si le "débiteur n'y satisfait pas lui même."

Now, in the present case, has the principal debtor failed to pay? The cautioner says he has not, at least up to a certain point. It is admitted that, on third August 1859, the principal debtor made a payment of 75 dollars to the creditors; and for that the cautioner says the creditors must allow him credit as for so much paid to account of the debt which he guaranteed. Now, supposing there had been no other claims by Leishman & Co. against Gallanty, except the guaranteed one, such a payment to account must have *pro tanto* lightened the cautioner's obligation; why should it not do so here?

No doubt the creditors argue in this way: Gallanty, the principal debtor, made no appropriation or imputation of the sum paid by him to account, and we chose to put it to the account generally, leaving a balance of $ 250 75 c. still due, for 205 d. of which, the amount to which the guarantee is limited, we now sue the cautioner. But are the creditors, by law, entitled to make such an imputation?

It appears to the Court that they are not. In the first place, this mode of proceeding would really constitute a totally different guarantee, far heavier against the cautioner, and contrary to all the legal rules of cautionry. It would be equivalent of saying that the guarantee was not, as it really was, pure and simple for payment of fifty bags of rice, but for payment of any balance of eighty bags of rice which the debtor might not pay up, to the value of fifty bags. That is quite another affair. The cautioner knew nothing of any sale of rice to Gallanty beyond the fifty bags which he guaranteed.

But further, in the Civil Code, as in all the modern legal systems derived from the Roman law, as that of Scotland for example, there are certain fixed and determined rules regarding the imputation of indefinite payments. The modern rules, in different country, are not in all respects identical. This could scarcely be looked for, but there is what may be called a strong family resemblance running through them all.

In his commentary on article 1250 C. C, MARCADÉ. Vol. IV. Page 554 says: "Ainsi, l'imputation se fera plutôt sur une dette emportant contrainte par corps que sur d'autres ; plutôt sur celle qui produit intérêt que sur celles qui n'en produisent point, sur une dette hypothécaire plutôt que sur une dette chirographaire ; sur celle pour laquelle le débiteur a donné caution plutôt que sur celle qu'il devait seul, car il a plus d'intérêt à s'acquitter, en même temps, envers deux personnes, qu'envers une seule."

So TOULLIER, Page. 252 Vol. 7. writes : "Ainsi l'imputation doit se faire sur la dette qui le soumet à la contrainte par corps, plutôt que sur les autres, sur la dette qui produit des intérêts plutôt que sur celle qui n'en produit point ; sur une dette hypothécaire, plutôt que sur une chirographaire ; sur la dette pour laquelle il avait donné des cautions, plutôt que sur celle qu'il devait seul, parcequ'il s'acquitte à la fois envers deux créanciers ; sur la dette dont il était débiteur principal, plutôt que sur celle qu'il ne doit qu'en qualité de caution ; sur celle qui contient une clause pénale, faute de paiement, plutôt que sur les autres, &a.

"Le principe que l'imputation doit être faite sur la dette la plus onéreuse au débiteur, est fondé sur la présomption que c'est ainsi qu'il en eut agi, s'il avait été averti : *Quod veteres ità definierunt, quod verisimile videretur diligentem debeitorem, ità negotium suum gesturum fuisse. Leg.* 97, *ff. de solut.*"

This learned author also cites, in a note, an old French case not unlike the present.

"Voyez dans le *Recueil* d'AUGEARD, l'arrêt du trois Août 1709, qui jugea que le débiteur n'ayant donné caution que pour la moitié de sa dette, la somme qu'il avait payée à valoir, sans imputation dans la quittance, devrait s'imputer sur la partie cautionnée."

The case of *Dacaud vs. Preneuf*, decided in the "Cour Royale de Grenoble," 29th June 1832. SIREY 33—2—572, confirms the rule.

It is perhaps not unworthy of remark that the same rule has been adopted in the Jurisprudence of Scotland ; BELL'S *principles*, section 563.

It may be observed that the sale of the 50 bags of rice, the price of which was guaranteed by Charon, took place on the 27th June 1859. There is no proof that the remaining three bags were sold before the 29th. On this footing, the latter part of Article 1256 of the Civil Code might apply to this case, as the price of the fifty bags would be *la dette la plus ancienne*, and the result would be the same ; but the Court does not found its Judgment on this view, as it was not argued by Counsel.

The Judgment of the Court below is, therefore, recalled, and it is ordered that, in settling, Charon shall be entitled to have the sum of $75, paid by Gallanty on third August 1859, put to his credit, in diminution of the obligation of guarantee undertaken by him.

Costs to Charon.

Supreme Court.

HYPOTHÈQUE DONNÉE EN GARANTIE D'UN COMPTE COURANT,—PREUVE TESTIMONIALE,—INTERPRÉTATION DES CONTRATS. C. C. 1341 ET 1162.

La preuve testimoniale ne doit pas être admise pour prouver outre et contre le contenu d un contrat, lors qu'aucune ambiguité possible ne résulte de l'une de ses clauses.

Dans le doute, la convention s'interprète dans le sens du lien le moins rigoureux.

MORTGAGE SECURITY GIVEN ON AN ACCOUNT, CURRENT,— ORAL PROOF,— INTERPRETATION OF CONTRACTS. C. C. 1341 AND 1162.

Parole evidence is not admitted to explain a regular deed, where nothing beyond a possible ambiguity, in the construction of a clause, is alleged. Where there is a doubt the lighter obligation is always presumed.

Number of Record :

Before :
His Honor the CHIEF JUDGE and the Honorable N. G. BESTEL, 2. P. J.

WIDOW ST. PAUL, Plaintiff.
Versus.
WILSON, SEWARD & SWALE, Defendants.

J. ROUILLARD,—Of Counsel for Plaintiff.
J. GUIBERT,—Plaintiffs' Attorney.
E. BAZIRE,—Of Counsel for Defendants.
SLADE & BANKS,—Defendant's Attornies.

24th July 1862.

In the beginning of the month of August 1861, Madame Adolphe St. Paul, a retail dealer in the Town of Port Louis, waited on Messrs Wilson Seward and Swale, merchants

of that place, and asked to be supplied with goods in the way of her trade. As she was a stranger to them, Messrs Wilson Seward and Swale required some security before opening an account with her, and on the eleventh August 1860 she granted a mortgage on certain real property, in this Island, up to the sum of $ 1000. The mortgage ran in the following terms:

" Par devant Me Lisis Herchenroder (suppléant Me Vigoureux de K[Morvant) et son collègue notaires, à l'Ile Maurice, à la résidence du Port Louis, soussignés.

" A comparu."

" Made. Jeanne Françoise Lucie Legars, Ve de M. Adolphe St Paul, la dite dame propriétaire demeurant au Port Louis.

" Laquelle, pour garantir à Messrs Wilson Seward & Swale, le paiement des marchandises que ces derniers se proposent de lui fournir, au fur et à mesure de ses besoins, et jusqu'à concurrence de la somme de $1000.

" A, par ces présentes, affecté, obligé et hypothéqué spécialement, et jusqu'à concurrence de la dite somme, au profit des dits, Srs Wilson Seward & Swale, ce accepté pour eux, par M. Hardwick Wilson, négociant demeurant au Port Louis, à ce présent, agissant pour et au nom de la maison de Commerce, existant en cette ile, sous la raison sociale Wilson Seward & Swale, dont il est membre gérant, ayant la signature sociale ainsi qu'il le déclare.

" Une portion de terrain &a.

At the date of twenty seventh October 1860, furnishings had been made to Madame St. Paul, to the value of $1030.70; on the twenty fourth October previously she had paid a sum of $100 to account. so at the former date, of twenty seventh October shewed $930.07.

At that date she granted, to Messrs. Wilson & Co., a second mortgage, over the same subject, for the sum of $500, in all respects the same as the first, *mutatis mutandis*. Subsequently, a variety of furnishings were made to the Plaintiff and various sums exceeding $1500 were paid by her, to account, from time to time. At the date of seventh August 1861, she stood indebted to the Defendants in the sum of $1520.90, according to their account as rendered to her.

Dealing with the mortgages, as establishing, in their favor, a security for a running balance, whatever it might, at any moment, amount to, not exceeding £1500. Wilson & Co, on twenty third August 1861, caused a notice previous to levy to be served on the Plaintiff, and, on the 14th October thereafter, the property was seized, placed under legal custody, and advertized for sale.

The present action was then raised by Madame St. Paul, who prayed the Court to rule that: " the mortgaged security " given by the Plaintiff to the Defen- " dants, for the payment of the sums " of one thousand and five hundred dollars, " according to the notarial instruments of " the eleventh day of August, and " 27 oc- " tober 1860, has become extinct and null " and void, to all intents and purposes, by " the payment of the aforesaid sum of " $ 1,500, which has been effected, before the " date of the service of the notice previous to " levy of the Plaintiff's property; and that the " said notice, the memorandum of seizure, " drawn up at the Defendant's suit, and all "proceedings connected with the seizure of the " Plaintiff's real property," situate in the Dis- " trict of Pamplemousses, are null and of no " effect, and besides to authorize the Conserva- " tor to erase from his books the Inscription " which have been taken in virtue of the " notarial instruments aforesaid, and the " seizure of the Plaintiff's property which has " been transcribed at his office, at the Defen- " dants, suit, and the said Plaintiff further "prays this Court to condemn the Defendants " to pay the sum of three hundred dollars, as " damages, for having, without any right or " title, seized and placed under the custody " of law, the Plaintiff's property, and for " having, by the said seizure, prevented the " Plaintiff from selling or leasing the property, " with costs against the Defendants."

JOHN ROUILLARD, for Plaintiff, argued:

The case is quite short and simple. The mortgages granted by us were for $500. We have paid them off, as the Defendants have received, from us, upwards of that sum, for goods supplied to us. The new theory adopted by the Defendants, of security for a running balance not exceeding $1500, may be very convenient for them, but was never understood or intended by us, and receives no countenance from the terms of the deeds. I am prepared to show, by parole evidence, if necessary, that no one could understand the deeds in the sense of our opponents.

HIS HONOR THE CHIEF JUDGE: It is not at all likely that the Court would allow witnesses to be heard on the meaning of a regular notarial deed like this, where, so far as we have as yet gone, no technicality of language has been disclosed or anything, beyond a possible legal ambiguity, in the meaning, which a Court must resolve for itself as it best may from the whole scope and texture of the deed. C. C. 1341. The ambiguity if any, would be, according to LORD BACON's division, an *ambiguitas patens* not an *ambiguitas latens*. It is, speaking generally at least, in the latter class only, that parole evidence is admissible.

ROUILLARD : I do not press for the examination of the witnesses.

BAZIRE, for Defendants :

I submit *in limine*, that the Plaintiff should be nonsuited. There is no case to go to the Court, as no proof has been led to shew that Madame St. Paul has paid us any sum, far less 1500 p., which alleged payment is the foundation of her claim.

MR. JUSTICE BESTEL : In article 2nd of your own plea, you say that the goods supplied by you : "were of great value namely "3,332 drs. 34 ¢, or thereabouts," in article 4th you add : "That credit being given to "the Plaintiff, for all and singular the pay- "ments alleged to have been made by her to "the said Defendants, it would appear, on an "account being taken between the Plain- "tiff and the Defendants, that there was "and now is a large sum of money, to "wit : Fifteen hundred dollars, or up- "wards, due and owing by the Defen- "dants, for goods, chattels and mer- "chandize so supplied, by the Defendants to "the Plaintiff, upon the faith of the before "mentioned notarial instruments, as such "mortgage security or securities as aforesaid, "and which said amount of fifteen hundred "dollars now remain unpaid ; and there "being a sum of $1500 now due and owing, "from Plaintiff to Defendants, and unpaid "as aforesaid, the said Plaintiff has not, "nor can she legally claim to have, liberated "herself, in respect of the Defendant's said "claim and mortgage securities ; and the "said mortgage securities have not become "extinct, and are not void, but are good, "valid and effectual in law, to all intents and "purposes whatsoever." This looks like an admission of payment of the sum of $1500.

CHIEF JUDGE : At least it is quite sufficient to obviate the effect of Mr. Bazire's argument, that the Plaintiff should be instantly put out of Court, by a non suit.

Madame St Paul herself was called upon interrogatories, she admitted the granting of the mortgages, in terms of the deeds, and stated that she had liquidated the amount, namely $1500 ; that goods had been delivered to her for a larger amount than the balance remaining unpaid, and that the Defendants have entered suit for that balance. That when she first called on the Defendants to solicit supplies of goods, she was quite a stranger to them.

BAZIRE, in continuation : The word in the mortgage, *au fur et à mesure de ses besoins* are very important. They show the nature of the arrangement to have been a running one. There is no limitation whatever in point of time. (DALLOZ Cte courant. 1. 2.) The Plaintiff has reaped the whole advantage of the goods delivered to her, and she ought to pay the price : All the proper requisites concurred for a legal mortgage, and all the forms of law were observed C. C. 2148. The Plaintiff is not entitled, by making an imputation of payments favorable to herself, to get quit of her obligations. The rules of payment without specific appropriation are not admitted in accounts current. C. C. 1256. GILBERT in *loco*. No. 1 and 2. ROGRON adeundem. SEE SMITH's Mercantile law, Page 473. "Surety how "far liable." Mr Smith says : "The best "rule, on the subject, seems to me to be that "laid down by LORD ELLENBOROUGH in *Merle "vs Hills*, namely : that if a party meant to "confine his liability to a single dealing he "should take care to say so." See also DALLOZ "Hyp. conventionnelle."

As for any claim of damages, even if we were wrong in our pretensions, it is quite out of the question here. Our proceedings have been entirely in conformity with the law. C. C. 2213.

ROUILLARD, in reply : Much ingenuity has been shewn, on the other side, but the real case remains untouched. There was no account current here, so we have nothing to do with the principles of such arrangements. The words *au fur et à mesure* are not to be read alone, but must be taken with the context. I ask only for nominal damages.

JUDGMENT.

THE COURT said : The discussion here has been somewhat discursive, and several matters have been argued, which are not within the case. For example, we have no question here of a guarantee given by a third party, although there may be a certain analogy between cases of that description, which have been very copiously quoted from the English Books, and a security given, as in this case, by the debtor himself over an immoveable subject.

So again, the peculiar principles of the law of imputations of payments do not apply here. There is no question of debt here ; the point is one of security or mortgage, there can be little doubt that there is still owing to the Defendants a considerable sum of money (apparently about $1500) for goods *bonâ fide* supplied by Madame St. Paul, for recovery of which the ordinary legal remedies are open to them ; but the point, and the only point before the Court for decision, is this : What is the real effect, in law, of the mortgages given by that lady ? Were they, as she contends, merely in security of the first $1500 worth of goods, the Defendants should supply ? Or, were the mortgages given so as to meet and cover any balance arising against her, on the transaction of parties, at any time, not in excess of $1500 ? In other words, were the immoveable subjects burdened with a mortgage, for what is usually called "a running balance," on an account

between parties? Or was the mortgage security, a security for the goods at first supplied, up to the value of $1500?

If the contention of the Plaintiff is correct, then the mortgages are at an end, as she has paid the amount, and consequently the seizure by levy was unwarrantable; if the views of the Defendants are to be sustained, then they were quite entitled to do all that they have done, towards attaching and selling the subjects for the payment of their debt.

The words of the writing are few and not indistinct. (*Already quoted.*) It cannot be disputed that they may very well mean what the Plaintiff says she intended and understood, when she subscribed the deed, namely: that she gave this real security, simply for goods to be advanced to her to the amount of $1500 and nothing further. Indeed had this been the intention and purpose of both parties, it would have been difficult to select words more fitting for carrying out their object.

Now does the meaning attached to those words by the Defendants, equally, and as naturally, present itself to the mind? On the perusal of the above clause, we think that it does not.

Their meaning and understanding is thus stated by themselves, in the pleadings: "That "it was agreed, by and between Plaintiff and "Defendants, that Plaintiff should open an "account, on credit, with the Defendants, "upon the terms hereafter mentioned, and "that such account was opened accordingly, "and that there was, and is, an account in the "nature of a running account, between the "said Plaintiff and the Defendants. And "further that it was agreed between the "Plaintiff and the Defendants, that Defen-"dants should supply to Plaintiff goods, chat-"tels and merchandize, in the way of the "Plaintiff's business, from time to time, as "she should want them, for the purposes of "her trade, as a draper. And that for the "goods, chattels and merchandize so, from "time to time, to be sold and delivered by the "Defendants, to the Plaintiff, in manner as "she might require them as aforesaid, and "for any balance which might be or become "due from the said Plaintiff to the said "Defendants, upon such running account as "aforesaid, in respect of the same goods and "merchandize, the said notarial instruments "in the Declaration mentioned, should be a "continuing guarantee and guarantees to the "amount, respectively, of one thousand and "five hundred dollars."

We are of opinion that this meaning, to say the very least, does not arise so readily from the expressions used by the parties. But further, by an express rule of the Civil Code, Article 1162, it is said: "Dans le doute, la "convention s'interprête contre celui qui a "stipulé et en faveur de celui qui a contracté "l'obligation."

This rule proceeds on the well known principle of Court law, that *in dubio*, the *obligatio levior* is always presumed. Accordingly, the observation attributed to LORD ELLENBOROUGH, in *Merle vs Hills*, a case of cautionry or guarantee, would not be law in Mauritius.

Besides, cautionary obligations are, here, as in all the countries governed by the general Rules of the Civil law, strictly interpreted in favor of cautioners, not against them. If, indeed, a cautioner were himself to write the guarantee and hand it to the creditor, something might be said in favor of the principle of reading its terms against himself, as *contra proferentem*, though, even then, the more general rules of interpretation in his favor, would probably be held to govern the case. No such question occurs here. The writing was not prepared by Madame St Paul, but was a notarial deed drawn up in the form of an acte authentique, by a notary, before whom both parties appeared.

It has been argued that the words "*au fur et à mesure*," shew that a running balance was in the view of parties. We do not think so. The words were simply that goods were to be supplied, "*au fur et à mesure de ses*" (*Madame St. Paul's*). "BESOINS," and up to a certain value, in money. Nothing more.

As to the point of damages, no real claim of loss has been put forward by the Plaintiff, far less proved in evidence. She remains largely indebted to the Defendants and certainly does not stand in a position favorable for making any demand in damages.

The Court finds and decrees, that the mortgages in question are extinct, that the notice previous to levy, memorandum and all the proceedings following thereon, are null and void, authorises the Conservator of Mortgages to erase from his books the Inscriptions following on the said mortgages, and all other entries therein, finds no damages due to Plaintiff.

Costs of suit against Defendants.

Supreme Court.

COLLECTEUR DES REVENUS INTÉRIEURS,—SES POUVOIRS,—REFUS DE DÉLIVRER UNE PATENTE POUR LA VENTE EN DÉTAIL DES SPIRITUEUX,—ORD. No. 8 DE 1861.

COLLECTOR OF INTERNAL REVENUES,—HIS POWERS,—REFUSAL TO DELIVER UP A LICENSE FOR THE RETAIL OF COLONIAL SPIRITS,—ORD. No. 8 OF 1861.

NELROSE GRANDCOURT,—Plaintiff.
Versus.
ACTING COLLECTOR OF INTERNAL REVENUES,—Defendant.

Before:

His Honor the CHIEF JUDGE, and
The Honorable N. G. BESTEL, 2d P. J.

J. L. COLIN,—Of Counsel for Plaintiff.
C. LABORDE,—Plaintiff's Attorney.
S. J. DOUGLAS,—Subs. Proc. & Adv. General.
J. BOUCHET,—Queen's Attorney.

21*st August* 1862.

This was a motion for a Rule calling on Chasteauneuf, the Acting Collector of Internal Revenues, to shew cause, why a *Writ of Mandamus* should not be issued by the Court, commanding him to deliver, to Applicant, a License for the selling of spirituous liquors, at a certain shop, in the District of Rivière du Rempart.

The motion was grounded on the following affidavit:

"J. Nelrose GrandCourt, of the District "of Rivière du Rempart, Shop-Keeper, make "oath and say:

"That, on 13th September 1861, the Li- "cense granted by the competent authority, "to Edouard Zoé, for the selling of spirituous "liquors and other things has been transfer- "red to me, on account of the purchase I "made of the stock in trade of the said "Edouard Zoé.

"That the License granted to the said "Edouard Zoé, and transferred to me, expired "on 21st January last.

"That, in order to continue my trade, I "went, a few days before its expiry, to the "Collector of Internal Revenues of this "Colony, provided with the documents requi- "red by law, in order to pay my Licence, for "continuing my trade; that, then and there, "I offered to pay the amount of the duty "which I owed for my said License, for the "current year, and tendered the sum of £29, "which is the amount due on a License for "selling spirituous liquors; that, there being, "my said License was refused to me, by orders "of the Acting Collector of Internal Reve- "nues of this Colony; that since then, I "made, by myself and by others, several "visits, in order to have amicably my said "License, which has always been refused to "me without any motive.

"That I have purchased the stock in trade "of the said Edouard Zoé, at a very high pri- "ce, knowing the profits accruing therefrom, "and that, on account of the refusal made to "me of the said License, I am prevented "from realizing the expectations I had, when "I purchased the same; that should my said "license be refused to me, I shall be ruined.

"That I am ready and offer to pay what "may be asked from me, for my said license, "and cannot perceive the reason which may "authorize the said Acting Collector of In- "ternal Revenues to be so hard towards me; "and that I have been informed, by persons "learned in the law, that I was entitled to "my said License."

The Court granted a Rule returnable in eight days.

DOUGLAS, Substitute Procureur General, shewed cause on the following affidavit:

"I, Augustus Chateauneuf, Acting Collec- "tor of Internal Revenues in and for this "Island of Mauritius, make oath and say that, "on the application of Nelrose GrandCourt, "made to me for a license for selling spirituous "liquors, I refused the said license on the "following grounds:

"1o. Because the shop in which such spiri- "tuous liquors were to have been sold was "within a quarter of a mile of a distillery, and "2o. because the said Nelrose GrandCourt "was convicted, before the Supreme Court of "Mauritius, on 13th November 1852, on an "Information lodged against him and others, "for having illicitly removed colonial spirits, "as appears by a certified copy of the Infor- "mation and Conviction in such case, hereunto "annexed, and marked A and B respectively. "And that such refusal, on my part, was made "in accordance with Law in force at Mauri- "tius, Ordinance No. 8 of 1861, enacted to "make temporary provision for preventing "frauds upon the Revenue derived from dis- "tilling spirits."

Counsel argued: The Collector acted strictly within the powers conferred upon him by the above Ordinance. By Section 2 it is enacted:

"No person shall, except as hereinafter "provided, be entitled to obtain a License "authorizing the retail of spirits, in any "premises within one quarter of a mile of "any distillery erected, or in course of erec- "tion respectively, before or at the date of "such License, and no person shall, except as "hereinafter provided, be entitled to obtain a "License, authorizing a distillery to be erec- "ted, or to be worked, within a quarter of a "mile of any premises on which spirits shall "be retailed at the date of such License.

"Provided that it shall be lawful to the "Collector of Internal Revenues, for special "reasons satisfactory to him, to grant Licen- "ses for the retail of spirits, or for the erec-

"tion, or working of Distilleries, within the "limits aforesaid. Any License which shall be "in opposition to the provisions of this arti- "cle shall be cancelled by the District Ma- "gistrate."

Sections 3 and 6 are in the following terms:

"Section 3. The Collector of Internal Re- "venues may, for causes satisfactory to him, "refuse to renew any License for the retail of "spirits, on any premises, within the said "distance, of any existing distillery.

"Section 6. The Collector of Internal "Revenues may refuse to renew any License "aforesaid of, or to issue a new License to, "any persons who shall have been convicted, "before any competent tribunal, of having "illicitly distilled, rectified, removed, trans- "ported or sold Colonial spirits."

Counsel continued: The frauds on the Revenue are so notorious, in this Colony, that those stringent laws were absolutely necessary.

J. Colin. The Collector can base his case only on the reasons given in the affidavit. He does not plead on Section 3. It is, therefore, out of the views of the Court. As for Section 6, the Collector, some time ago, attempted to enforce it, so as to prevent the erection of Distilleries within the limits. The distillers, however, form an opulent and principal body. They remonstrated, and the Government at once yielded the point. Not so in the case of humble retailers, like my clients. They are to be ruined at the caprice of a Collector. The excuse here given is that the applicant had been once convicted of a contravention of the Distillery laws. But that was seven years ago, and he paid the penalty. By the fundamental law of the Colony, Ordinances can have no retrospective operation. C. C. Article 2.

JUDGMENT.

The public Officer of the Revenue has here supported his refusal to grant the Certificate, upon the enactments of the Ordinance No. 8 of 1861, and certainly they are very broad. The case of the Applicant is, we think, one of hardship, but it is the duty of a Court of Justice to adminster laws not to criticise their policy. It appears to us that the Collector has in law justified his refusal.

Rule discharged, with costs.

Supreme Court.

Délit,—Contravention a la loi sur les Distilleries,—Peines,—Ord. 26 de 1853 et 8 de 1861.

Misdemeanor,—Contravention to the laws on Distilleries,—Penalties,—Ord. 26 of 1853 and 8 of 1861.

THE QUEEN, Plaintiff.
Versus.
Ar. PERDREAU & Anor., Defendants.

Before:
The Honorable N. G. Bestel 2nd. P. J.

S. J. Douglas,—Subs. Proc. & Adv. Gen.
E. Nolin,—Crown Sollicitor.
G.B. Colin,— } Of Counsel for Defendants
J. L. Colin,— }
J. Pigneguy,—Defendants' Attorney.

21st August 1862.

The Criminal Information in this case, filed on 22nd April 1862, included a larger number of names. But, on this case being called for trial, the Substitute Procureur and Adv. General, moved for leave to enter a *Nolle Prosequi*, as to seven of the parties charged, namely: 1o. Clodomir Mamet, 2o. Arthur Mamet, 3o. Jean Lagouarde Lhoste, 4o. Badur, 5o. Mamodally, 6o. Sookon, 7o. Sirage.

The *Nolle Prosequi* was ordered to be recorded, and the Court proceeded to the trial of Arthur Perdreau, the said Arthur Perdreau, charged with having: 1o.—On the fourth March 1862, illicitly concealed a certain quantity, to wit: 19 gallons of spirits upon which the duty was then chargeable and unpaid.

2o.—With having, the said A. Perdreau, on the day and year aforesaid, knowingly removed from the Still Room, in the compounding and rectifying establishment of the said Arthur Perdreau, situate in the Hospital street, Port Louis, to a cellar situate underneath the said Still Room, a certain quantity, to wit: 19 gallons of spirits, without permit.

3o.—With, the said A, Perdreau, having had, on the day, year and on the premises aforesaid, a certain quantity, to wit: 19 gallons of spirits, which had before been illicity removed.

4o.—With having, the said A. Perdreau, received into his possession, on the day and year aforesaid, on the premises aforesaid, a certain quantity, to wit: 19 gallons of spirits, without the same being accompanied by a proper permit.

5o.—With having, the said A. Perdreau, had, on the day and year aforesaid, in the cellar of the premises aforesaid, a certain quantity of spirits, to wit: 19 gallons of spirits, duty unpaid, such cellar not designated in the License issued to the said Perdreau.

And charging the said Henry Legoy with

having aided and abetted the said Perdreau in the commission of the offences, in the 1st. and 2nd Counts setforth, against the form of the Ordinance in such case made and provided.

The 6th, 7th, 8th, 9th, 10th, and 11th Counts charge the said Perdreau with having given, on the day and year aforesaid, to the Inspectors of Distillery, named in the 6th, 7th, 8th, 9th, 10th, 11th Counts, the bribes therein stated.

The case was fully argued. Much was said, on the part of the defence, to invalidate the evidence tendered. Be that evidence worthless as it has been represented, it must be borne in mind that, in these Excise laws, and as to some of the offences charged, the general rule of the Criminal law has been departed from.

The General Rule, in Criminal matters, throws the *onus* of proving the charge on the Public Prosecutor, but in Ordinance No. 8 of 1861, special to the subject matter before the Court, it lies on the party charged to dispose the guilt imputed to him, or, in the words of the Ordinance, Article 12.

"Whenever any person, found with any "quantity of Colonial spirits in his possession, "shall be charged with having removed or "received the same, in contravention of Ordi- "nance 26 of 1852, or of this Ordinance, it "*shall lie* on such person to prove that *he did* "*not so unlawfully remove* or *receive* the "same.

"Whenever any person shall be charged "with having, on any property or *premises* "of which he is proprietor or *occupier*, any "illicitly removed spirits, *being cognizant* of "such spirits being there deposited, it *shall* "*lie on such person* to *prove* that any spirits "found on such property or premises *have not* "*been* illicitly removed, or that, if illicitly "removed, *he had not cognizance* of such "illicit removal.

"Failing such proof, in any of the cases "mentioned in this article, the person charged "shall be convicted, sentenced and punished, "in the same manner as if the facts so char- "ged against him had been fully proved."

In compliance with the text of the Ordinance, I have not to enquire whether the evidence in support of the several charges, referred to in the above cited article, is sufficient to warrant a conviction, but how far the evidence, adduced in favor of the defence, has successfully rebutted the presumption of guilt expressly established by the Section of the above cited Ordinance.

On carefully weighing the evidence given by Perdreau, I am bound to say that evidence does not disprove the facts established in Inspector Stock's deposition, namely: The existence and presence, in Perdreau's cellar, of 19 gallons of rum. Merely saying that he was not cognizant of the spirits, being in the cellar is no evidence of Perdreau's ignorance of the fact. Proof of his having been absent from the Establishment, on the day on which the discovery of the spirits was made, or a few day's before, whether from illness or any other cause, or of the loss of the keys of the cellar, might have led one to attach a certain degree of credit to such an assertion.

Again, as owner of the Establishment, and responsible to the Crown, for the Government dues, has Perdreau satisfactorily accounted for the *quantum* of the rum delivered to him. He has done nothing of the kind.

In obedience therefore to the law, Ordinance No. 8 of 1861, special to this matter, and whatever may be my opinion as to the expediency of the enacted departure from the ordinary Rule of the Criminal law, Arthur Perdreau, having failed in proving that he had unlawfully removed and recovered the quantity of Rum found in his possession, having also failed in proving that the said spirits had not been illicitly removed, and if illicitly removed, that he had no cognizance of such illicit removal, of the rum found removed into, and deposited in, the cellar of the premises of which he is the occupier, it is my duty to convict, sentence and punish A. Perdreau, of the offences in the first five Counts of the Criminal Information, as if the facts, so charged against him, had been fully proved by the prosecution. I therefore convict the said Perdreau of the facts charged against him, in the first five Counts of the said Criminal Information:

1st. Count.

Of having, on the 4th March 1862, illicitly concealed a certain quantity, to wit 19 gallons of spirits, upon which the duty was then chargeable and unpaid. For which offence the said Arthur Perdreau have incurred a Penalty of £ 50 and Imprisonment for a period of one month. (Ordinance 26 of 1853, Section 7. Ordinance 8 of 1861, Sections 8 and 11.

2d. Count.

Of having, on the day and year aforesaid, at the place aforesaid, knowingly removed, from the Still Room in the compounding and rectifying Establishment of the said Arthur Perdreau, situate in Hospital street, in the town aforesaid, to a cellar underneath the said Still Room, a certain quantity, to wit: 19 gallons of spirits, for the removal of which a permit was then and there required by law, without having obtained any such permit, against the form of the Ordinance in such case made and provided.

For which offence the said Arthur Perdreau

has incurred a penalty of £ 50 and Imprisonment for a period of one month. (Ordinance 26 of 1853, Section 36. Ordinance 8 of 1861, Section 11.)

3d. Count.

Of having had, on the day and year aforesaid, a certain quantity, to wit: 19 gallons of spirits, which had, before then, been illicitly removed, and was found on certain premises, situate in Hospital Street, in the town afore said, and occupied by the said Arthur Perdrau, he the said Arthur Perdrau being cognizant of such spirits being there deposited, againt the form of the Ordinance in such case made and provided, for which offence the said Perdrau has incurred a penalty of £ 50, and imprisonnement for a period of one month. (Ordinance 26 of 1853, Sections 29. Ordinance 8 of 1861, Sections 11.)

4th Count.

Of, the said Arthur Perdrau, being then and there a retailer of spirits and being such retailer, on the day and year first above mentioned, at the place aforesaid, having received in his possession, on certain premises, situate in Hospital street, and occupied by him, the said Arthur Perdrau, and for his account, a certain quantity, to wit: 19 gallons of spirits, required by law to be accompanied by a permit, without the same being accompanied by a proper permit, against the form of the Ordinance in such case made and provided. For which offence the said Perdrau has incurred a penalty of £50 and one month's imprisonment. (Ordinance 26 of 1853, Section 26, Ordinance 8 of 1861, Sections 11 and 5.)

5th Count.

Of having, then and there, he, the said A. Perdrau, being a compounder of spirits, and whilst being such compounder, had, on the day, year and place aforesaid, a certain quantity, to wit: 19 gallons of spirits, upon which duty was then chargeable and unpaid, in a certain cellar on the premises occupied by him, the said Arthur Perdrau, situate in Hospital street, which cellar was designated in the License issued to him, the said Arthur Perdrau, as compounder aforesaid, against the form of the Ordinance in such case made and provided, for which offence the said Perdrau has incurred a fine of £38 together with the forfeiture of his Licence and one month's imprisonment. (Ordinance 26 of 1853, Section. 45.—Ordinance 8 of 1861, Sections 5. & 11.

I have now to enquire into the guilt of Le-Goy, charged as having aided and abetted the said Arthur Perdreau in the several offences laid, in the 1st and 2d Counts, against the latter.

Le Goy was the servant of Perdreau, as such, entrusted principally with the retailing of the rum in Perdrau's shop. Further it must be borne in mind, that Le Goy lived on the premises, and it is not unreasonable to suppose that, unless he had but himself to it, it was a difficult matter, for a stranger, to have introduced, into the cellar, the casks and rum therein found; and it is not unreasonable likewise to suppose, on the occurrence of such a fact, that he would not have failed to bring the fact to the knowledge of his employer. On this head, however, he remains perfectly silent. He, it was, on the day when the contravention was discovered, who brought the keys of the cellar to Superintendent Stock, an instance shewing that the keys of the cellar were not withholden from him when need required.

I therefore convict the said Le Goy of having aided and abetted Arthur Perdrau in the commission of the several offences, of which Perdrau has been convicted as above, and for the offence in the 1st Count, Legoy is condemned to £50 fine, and one month's imprisonment.

2nd Count. He is condemned to £50 fine, and one month's imprisonment.

The Criminal Information furthur charges the said Arthur Perdrau, in the 6th. 7th. 8th. 9th. 10th. Counts, not with an attempt at bribery, but with having actually bribed the several Distillery Inspectors, therein mentioned, in charge of the Distillery, at the various times in the Criminal Information set forth.

On this head of the Criminal Information, the Ordinance has not departed from the usual rule of law throwing upon the Prosecutor the burden of proving the guilt of the party charged. I must therefore ascertain how far the evidence, in support of the prosecution, has brought guilt home to Perdrau. After a careful weighing of the evidence, on the Counts relative to the bribery of the Inspectors of Distilleries, therein mentioned, I am bound to say that, however strong my suspicions of the guilt of the party charged and other parties therein named, yet I do not find, in that evidence, adduced by the Prosecution, that amount of proof which can warrant a conviction.

I am therefore bound, on the bribery Counts, to declare Arthur Perdreau not guilty.

The payment of the fines, awarded against Perdrau and Legoy, must be effected within fifteen days, from this day. In default of such payment, the amount of which exceeding £50, Perdrau will have to undergo an imprisonment of six months and Legoy an imprisonment of 4 months.

Fines to be apportioned in the manner prescribed by the Ordinance in such case made and provided.

Costs against Perdrau and Le Goy.

Supreme Court.

SÉPARATION DE BIENS—JUGEMENT PAR DÉFAUT,—EXECUTION,—ARTS 1443. 1444. C. CIV.

SEPARATION OF PROPERTY BETWEEN HUSBAND AND WIFE,—JUDGMENT BY DEFAULT,—EXECUTION,—ARTS 1443. 1444. C. CIV.

Number of Record: 8313

LABISTOUR THE WIFE,—Plaintiff.
Versus.
LABISTOUR THE HUSBAND,—Defendant.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2d P. J.

E. LECLÉZIO JUN.,—Of Counsel for Plaintiff.
C. LABORDE,—Plaintiff's Attorney.
8 *August* 1862.

This was an application by a wife, duly authorized by a Judge at Chambers, for a Judgment, against her husband, of *separation de biens*. The husband left default.

The Rule issued, to show cause why judgment should not be signed against him for want of a plea, was returnable to day, and on a motion to make it absolute.

THE COURT said. This motion cannot at once, be granted, a matter of course. We must be satisfied, under Article 1443 of the Code Civil, that the *Dot est mise en péril*, and that the husband's affairs are in such a state that there is reason to fear that he cannot meet the legal claims of the wife, and also that all the publications and formalities of the Code of Civil Procedure, on the subject, have been observed.

On a subsequent day, THE COURT said:

We have examined the various papers in this case, and are satisfied that the Plaintiff is entitled to Judgment.

Rule absolute with costs.

By article 1444 C. C. it is enacted. "La "séparation de biens, quoique prononcée en "Justice est nulle si elle n'a point été exécu- "tée par le paiement réel des droits et reprises "de la femme effectué par acte authentique, "jusqu'à concurrence des biens du mari ou au "moins par des poursuites commencées dans "la quinzaine qui a suivi le jugement et non "interrompues depuis."

By the Rules of Court, Article 76, a party obtaining a judgment may, after fourteen days take out a Writ of execution. By the same Section the Court, or a Judge at Chambers, may order execution to issue at an earlier period, or may stay it till some future period. In the above case, the Judge at Chambers allowed execution on the Judgment to issue immediately.

Supreme Court.

ARBITRAGE,—FRAIS,—ORDRE DE LA COUR.
En thèse générale il convient de donner pouvoir aux arbitres de se prononcer sur la question de dépens tout entière, et que la convention des parties, qui institue l'arbitrage, soit confirmée par Ordre de la Cour.

ARBITRATION,—COSTS,—RULE OF COURT.
Usually it is a convenient form to give the Arbitrators power over the whole matter of Costs; and agreements of reference should be made a Rule of Court at once.

Number of Record: 7837

LUCAS, Plaintiff.
Versus.
FADUILHE, Defendant.

Before:

His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2. P. J.

J. L. COLIN,—of Counsel for Plaintiff.
J. PIGNÉGUY, — Plaintiff's Attorney.
G. B. COLIN,— of Counsel for Defendant.
C. LABORDE, — Defendant's Attorney.

2*d. September* 1862.

This was a suit at the instance of Lucas, calling on Faduilhe to convey to him three shares of the Planter's Dock Company, which the Plaintiff alleged belonged to him, in terms of a *contre lettre*, though allowed to stand in the Defendant's name, in the Books of the Company. Failing delivery of the shares, the Plaintiff asked the amount of $3,000 as their value, by way of damages.

The pleas of the Defendant were 1o. That the Court had no jurisdiction in the mattter which was only cognizable by arbitrators. 2ndly. That the action was premature; and 3rdly. That the Plaintiff has no right to claim any pecuniary condemnation against Defendant; that if the Court do decide that the said three shares are the property of the Plaintiff, nevertheless they must remain, (according to agreement,) in the Company's

Books, as the security of Defendaat, for his actings as manager of the *Planter's Dock Company*.

On these pleas issue was joined. On the 22nd May last the Court pronounced the following order:

"That all matters in difference in this "cause be referred to the award, order, arbi- "trament, final end and determination of the "Honorable Christian Wiéhé, so as he shall "make and publish his award in writing, of "and concerning the matters in dispute and "referred, ready to be delivered to the said "parties or such of them as shall require the "same, (or to their respective personal re- "presentatives if either of the said parties "shall die, before the making of the said "award), on or before the twenty second day "of June, now next ensuing, or such further "day as the said arbitrator may, from time "to time, by writing under his hand to be "signed by him and, indorsed on this rule, "enlarge the time for making his said award.

"And, by the like consent, it is ordered "that the said parties shall, in all things "abide by, perform, fulfil and keep such "award, so to be made as aforesaid, and that "the costs of this action shall abide the event "of the said award, and that the costs of the "reference and award, shall be, in the dis- "cretion of the said arbitrator, who shall "direct by whom, to whom and in what man- "ner, the same shall be paid.

"And, by the like consent, it is further "ordered that the said arbitrator shall be at "liberty, (if he shall think fit,) to examine "the said parties to this suit, and also to "examine, upon oath, or affirmation, their "respective witnesses, and that the said par- "ties do and shall produce before the said "arbitrator all such books, deeds, papers, "documents, and writings, in their or either "of their custody, power or control, touching "and relating to their matters in difference, as "the said arbitrator shall think fit to require."

On the 21st June, the arbitrator enlarged the time for giving the award, till 15th July next. On the 3rd July, parties having been duly heard, he pronounced the following decision:

"Considering that Alphonse Lucas promi- "sed and consented to allow three shares of "the *Planters Dock Company*, his property, "according to Eugène Faduilhe's written "declaration, to remain in the name of the "said Eugène Faduilhe, for the purpose o "representing the complement of the securi- "ty required from him, as manager of the said "*Planters Dock Company*.

"Considering that Faduilhe is absent from "the Colony, on a two years leave of absen- "ce. And further that the Committee of "Control of the said *Planter's Dock Compa- "ny* has, on account of the satisfactory state "of the Books and Warehouses which he, "the said Faduilhe, had under his charge, "released and liberated him from the securi- "ty furnished as manager.

"Considering that, in consequence, there "exists now no cause for the promise and "consent given by Lucas.

"I hereby order that Eugène Faduilhe "shall, within ten days from this date, duly "transfer three shares of the *Planters Dock "Company*, in the name of Alphonse Lucas, "thereby returning to him his property, or in "default thereof, shall duly pay him $3,000, "the nominal value of the said shares. No "costs of award.

3rd. July 1862.

(Signed) CHRISTIAN. W. WIÉHE.

The Plaintiff now moved the Court to make the Award a Rule of Court, and to order that execution do issue thereupon, as well for the principal debt, as for the costs of suit; (except the costs of award which have been allowed to neither party). Costs of the motion to be paid by Defendant.

THE COURT: The first part of the motion we shall grant at once, namely: making the award a rule of Court, the remainder of the motion requires consideration.

J. L. COLIN, for Plaintiff: The costs of the suit were not before the arbitrator; his right to decide questions of the sort was limited to costs of the arbitration, with which alone he has accordingly dealt. (ARCHBOLD, Page, 480.)

The costs of the action wereto abide the result of the case. That result has been entirely in our favor, and therefore, just as if the case had been determined by the Court itself, I am entitled to ask my expenses.

G. B. COLIN for Defendant: The invariable rule, in this Court, is to homologate the decisions of arbitrators, as they stand, and not to add to or take from their terms. (*Bolgerd v. Frichot* in this Court). If the Court really considered that there was any room for change it would send the matter back to the arbitrator. (*Rees v. Waters*. 16 W. and M. 300, 12, L. J. Q. B. 11 5.)

The arbitrator has power, at Common Law, to award costs, and as the suit was prematurely raised, seeing the Plaintiff has agreed to let the shares stand as security for my client, the costs ought to have been awarded to him.

THE COURT: The last observation of the learned Counsel leads us to remark that, in England, the arbitrators' powers over the costs depends entirely upon the terms of the submission. In countries recognizing the more immediate impress of the Civil Law, the Rule is different; costs are dealt with as mere incidents of the suit, and this principle has been given effect to, in the House of Lords, in Appeals from the Scottish Courts. See *Ferner versus Alison.*—5. BELL'S Appeals. 61. But, in the present case, the costs of the action were ordered to abide the event of the suit, a form of expression frequently adopted in England, but as experience has shewn, not a very convenient one.

It often happens that the result of the suit is a divided one, and fresh contestations naturally arise in the Court, as to how the costs are to be awarded. Usually, it would be better to give the arbitrator direct power over the whole costs, and all agreements of reference, in suits, should, at once, be made Rules of Court, to prevent subsequent discussions as much as possible.

In the present suit, we have now had enough of discussion on the merits of the questions between parties, to be satisfied, that in the action, as in the arbitration, no costs ought to be allowed to either party. The Judgment of the arbitrator, which has been already made a Rule of Court, will therefore receive execution, as it stands.

No costs of motion to either party.

Supreme Court.

APPEL D'UN JUGEMENT D'ADJUDICATION DU MASTER, — VENTE D'IMMEUBLES DÉPENDANT D'UNE FAILLITE,—VENTE AU-DESSOUS DU PRIX D'ESTIMATION,—C. C. ART. 884,—C. DE P. C. ART. 953,—C. DE C. ART. 574,—ORD. SUR LES FAILLITES DE 1838 ET 1853.

L'appel d'un jugement d'adjudication concerne également un Ordre du Master, portant la même date que l'adjudication, et refusant le renvoi de la vente.

Les ventes d'immeubles dépendant d'une faillite sont, par la loi de Maurice, sous le contrôle et la direction immédiate du Master de la Cour Suprême; et ce dernier a un pouvoir discrétionnaire, d une certaine étendue pour vendre au dessous du prix d'estimation.

APPEAL FROM A JUDGMENT OF ADJUDICATION OF THE MASTER,—SALE OF IMMOVEABLE PROPERTIES FORMING PART OF A BANKRUPT ESTATE,—SALE UNDER THE VALUATION PRICE,—C. C. ART. 884,—C. OF C. P. ART. 953,—C. OF C. ART. 574,—BANKRUPTCY ORDINANCES OF 1838 AND 1853.

An appeal against a final adjudication to a purchaser brings up an immediately preceding Order refusing to delay the sale.

The immediate conduct and management of sale of the immoveable Estates of Bankrupts is, by the law of Mauritius, vested in the Master, and he may exercise a reasonable discretion, in selling under the valuation price.

Number of Record: 8655

HERCHENRODER & ORS., Appellants.
versus
BOULÉ & ORS., Respondents.

Before:

His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL, 2nd P. J.

J. L. COLIN,— } Of Counsel for Appel-
G. B. COLIN,— } lants.
A. J. COLIN,—Appellants' Attorney.
S. J. DOUGLAS,— } Of Counsel for Respon-
H. KŒNIG,— } dents.
W. HEWETSON,— } Respondents' Attor-
J. H. ACKROYD,— } nies.

2nd September 1862.

Arnal, Cayrou and Co, being in bankruptcy, the Official and Creditors' Assignees obtained an Order, from the Commissioner, to sell their real estates, among others the property "*l'Avenir,*" in the District of Savanne.

The Assignees applied, in common form, to the Judge sitting at Chambers, and by Rule of Court, dated 14th April last, John Christian Curwen Millward, as sworn appraiser, was appointed to examine and put a valuation on the property.

This he did and the result was stated by him, in his Report, made and closed on 17th May 1862. The value fixed by the Appraiser was $102,000. After observance of the usual formalities of publication, &c. the sale came on, before the Master of the Supreme Court, when, according to the minutes of the day, the following procedure took place:

"At a public auction sitting, holden at my "Chambers, situate Government street, Port "Louis, and before me, HENRY COLLETT "BURY, Master of the said Court, on Tuesday "the fifth August 1862.

"Personally appears ANTONY J. COLIN, the "Attorney having the carriage of the sale; "who declares that he has made the several "publications prescribed by law, all of them "announcing for this day, at this hour and "place, the final adjudication of the Sugar "Estate l'*Avenir.*

"Whereupon, after seeing proof that all "the above formalities have been fulfilled by

" the Attorney having the carriage of the " sale; after the reading of the foregoing par- " ticulars of sale, and of all the several docu- " ments appended thereto, and publicly an- " nouncing that all costs, duly taxed amount, " up to this day, to £131.14 s. 4 d.

" Mr. ANTONY J. COLIN, for the suing " party, makes a bidding of $102.000, and " no one outbidding, Mr. Antony J. Colin, " for the suing party, declares that he merely " puts up the property for sale, at the amount "for which it is valued by the appraiser and as " there is no one who makes an outbidding " prays for a postponement.

" Mr. J. H. SLADE, attorney for the heirs " Wainwright, joins Mr. COLIN in his demand " for postponement.

" Mr. A. LEGALL, of Counsel for Charles " Cayrou, inscribed creditor, objects to a post- " ponement, and Mr. W. HEWETSON, Attor- " ney for Céline Domergue, inscribed creditor, " joins Mr. LEGALL.

" Upon hearing parties on both sides, I " refuse the postponement prayed for by Mr. " ANTONY J. COLIN, and I order that the " biddings be opened at a sum below the " valuation price.

" Mr. ARISTIDE LEGALL makes a bidding " of $ 80,000.

" Mr. WM HEWETSON makes a bidding of " $ 85,000 and signs.

" (Signed) WM. HEWETSON.

" And no one outbidding him, for $85,000, " Mr. ANTONY J. COLN, for the suing party, " again prays for a postponement, in as much " as the biddings have not reached the amount " of valuation by the Appraiser, and because " no one, but the Assignees' Solicitor, can " prosecute the sale, and ask for the adjudica- " tion; which I refuse.

" At the request of Mr. A. LEGALL, of " Counsel for Charles Cayrou, I order that " the 6th be deposited, together with the sum " of $8626,07c. due to Charles Cayrou, accord- ing to the particulars of sale.

" Mr. ANTONY J. COLIN further objecting, " to the sum due to Charles Cayrou being " handed over to him, according to the con- " ditions of sale.

" Whereas the suing party has formally " objected to my proceeding to sell this pro- " perty, and now makes this later objection, " declaring that his intention is to appeal " against my decision.

" I order that this later sum of $8626,07c. " be also deposited, pending the delays of " Appeal, against this my decision.

" Mr. A. LEGALL, of Counsel for Charles " Cayrou, objects to the deposit, and prays to " have his money, according to the condition " of sale; which objection I overrule.

" And immediately M. WM. HEWETSON " hands over to me the sum of $14, ¢166,67 " c. being the one sixth of the sale price, and " further the sum of $8626.07 c. the amount " due to Charles Cayrou; both sums I ack- " nowledge to receive.

" Whereupon I do finally award the said " Sugar Estate l'*Avenir* to Mr. WILLIAM " HEWETSON, for the sum of eighty five " thousand dollars, which sum I order him " to pay according to the conditions of sale, " and to fulfil all the other charges, clauses " and conditions imposed upon the purchaser " by the said conditions of sale.

" On Friday, 8th August, MR. WM. HE- " WETSON made a declaration, in terms of law, " that he had purchased for Cécile Egérie " Pilliet, the duly authorized wife of Alphonse " Boulé, both of Port Louis,"

The Official and trades Assignees appealed.

G. B. COLIN, for Appellant. The Appellants can have no personal object in bringing this matter before the Court. Their only desire is to do their duty to the whole mass of the creditors. The crop on the Estate, now ready for cutting, is a very fine one. In May last, the Estate was valued at upwards of $ 100,000, and yet, with such a crop ready to be cut, it is to go to $ 85,000, to the sacrifice of the interests of all the later creditors. The Master had no power to sell under the valuation price, particularly when the real exposers, the Official and Trade Assignees, objected. By the law of Mauritius these judicial sales are assimilated to the sales of minors' Estates. (C. Com. Article 574. C. Civil Procedure, Art. 953 and following.) There must be a resort to the Judge Commissioner who will order a second expertise. Just like a guardian of a minor, the Assignees sell not their own property but that of an other party. The principals have, in law, no *personâ standi*. (See SIREY 32 : 2 : 12.—13 : 2 : 44, and particularly 28 : 1 : 9.) The Assignees themselves, without the authority of the Judge Commissioner, cannot sell under the valuation price. (BIOCHE. "FAILLITE." 9. Articles 1244. 1551 and 1552.) In such cases the Master is a purely ministerial Officer, altho, I admit, in other situations, he may have important judicial functions to perform.

No individual creditor has a right to intervene and insist that the sale shall go on. The Assignee or Syndic represents the whole mass of creditors. Till the " Ordre " is finally fixed, no one can be sure that he will be able to maintain his position as a creditor, and the seizing creditor represents all the rest, till he is guilty of some wrongful act in the dis-

charge of his duties, which opens the door for a subrogation. (PIGEOT. 2. Page 173. BIOCHE "Vente." 525. SIREY 18: 2:237—19: 1: 103—26: 1; 395.)

J. L. COLIN, for certain creditors: We are) prejudiced by the sale of the Estate at this law price. The form of proceeding, in such cases, is fixed by express law. Section 88 of the Bankruptcy Ordinance No 33 of 1853 enacts in the following terms: "Where no action in "ejectment of the real Estates has been "brought, previously to the adjudication of "Bankruptcy, the assignees shall prosecute, "under the authority of the Court, the sale "of the insolvent real Estates, according to "the forms prescribed for the Judicial Sale "of real Estate."

There is no corresponding provision in the English Bankruptcy Act, from which our law is borrowed. This part of our law is of Colonial origin. There is no ejectment or *expropriation forcée* here: we therefore proceed by the forms of Judicial Sales applicable to the estates of persons in a peculiar position, minors, heirs under inventory, and Bankruptcy. In sales by forcible ejectment (expropriation forcée) there is no necessity for a fixed upset price; the levying creditor does every thing, (CARRÉ. 3.528.) Hence the distinction between the forms of proceeding in the two cases

S. J. DOUGLAS, for a party exercising the privileges of the vendor, also for the party who, under orders of the Court, has made advances, since the Bankruptcy, to carry on the Estate till the sale:

The interest of my clients to support the sale is self-evident. We want our money immediately. The advances, to supply the Estate with necessaries, since the Bankruptcy, and up to the sale, were made on the condition, expressed in the agreement, that the sale should take place in August. Let me put the case on its right footing. Let us loook at facts and figures. On the otherside it is said that injustice has been done to the mass of the creditors. This is a mistake. There are two Estates here, belonging to the Bankruptcy, with both of which the Master has dealt in precisely the same way. The first is called "*Valton*" and the second "*Avenir.*" Millward valued "*Valton*" $40,000. It has been knocked down at $ 34,100. But, by the *Cahier des Charges*, the purchaser is bound to pay a sum of about $ 4.500. the costs of keeping the Estate going since the Bankruptcy, which has been advanced, under the Order of the Court, by Messrs Thomas, Lachambre and Co. Add the costs which we will require to pay to retain our labourers, &a., and the full price of $ 40,000 is reached.

The other Estate "*Avenir*" was valued, by the appraiser, at 102,000 p. It was knocked down at 85,000 p. The charge of keeping the Estate going since the Bankruptcy and which the purchaser had to pay down, at the moment of adjudication, were about 8,700 p., add a reasonable sum for the costs the purchaser must disburse for keeping the immigrants on the Estate, and we are within a fraction the estimated value. Where is the sacrifice here? Where is fearful loss sustained by the Bankrupt Estate? If any thing of the kind had existed, there would surely, among so many persons who took an interest in the sale, have been found some one to make a *Surenchère* on the biddings, within the 8 days allowed by law, but no such *Surencherisseur* appeared.

I maintain that the Court will not interfere with the Master's proceedings here. Every thing was strictly formal and regular. There was an absolute and unconditional sale, in terms of the *cahier des charges*. There was no reference, in these articles, to any valuation which had been made of the Estate. In fact, the valuation was the result of a mere ex-parte application, of which no one knew any thing.

But I contend that this Appeal itself is defective, in point of form, and dont entitle the Appellants to raise the questions they have argued.

The Master, in each case, gave two Judgments on the same day, one refusing to delay the sale, the other adjudicating the Estates to the purchaser. There is no Appeal against the former of these Judgments, as there ought to have been, if the Appellants wished to argue, as they have done, that the sale should have been delayed,

The words of Section 88 of the Bankruptcy Ordinance are altegether mis-understood on the other side. The term "judicial sale," by the French law and the law of this Colony is the generic name, of which the sale of a minors' Estate is merely a species. (See BIOCHE. "Vente Judiciaire.") That term covers some half a dozen species, of which the sale of a minor's Estate is one, and the most strict. The rigour of procedure, there required, is quite unnecessary in selling Bankrupt Estates. The one is a voluntary sale, the other is a forced one. The Family Council authorises the procedure in the former, and the Officer of the Ministère Public may refuse, and sometimes does refuse, his consent.

In sales like the present there can be no advice of friends, or of a guardian, or authority given or withheld by a public officer. In the one case a valuation for the guidance of the friends, &a., is indispensible; in the other, it is a mere piece of form, as the Judge merely sanctions and does not order the sale. Judicial Sales, in France, are usually carried on by a mere Ministerial Officer, commonly a Notary; he is usually the nominee of the Syndics. (C. Com. Article 571. GILBERT.

No. 18.) In Mauritius, the Master of this Court has a superior position, and has original as well as delegated jurisdiction. By article 4 of the Order in Council of 1851, the Master is an Officer of this Court, whose jurisdiction it is, *inter alia*, to "conduct and "manage Judicial Sales." He is not here the Officer of the Bankruptcy Court, but of the Supreme Court, to which, accordingly, the present Appeal is brought. His functions, under the Bankruptcy Ordinance, are regulated by articles 7 and 8, and have nothing to do with his position in this case.

Even in France, it is only in the case where all the parties are minors that such strict forms are required. (BIOCHE, "*Vente Judiciaire*," Art. 84.)

By Rule of Court No. 167, the "Orders" and the "Judgments" of the Master are distinguished. The former can only be appealed within 8 days. I say the "Order" of the Master refusing to delay the sale has not been appealed from at all, and the present Appeal was beyond the 8 days. So the Order is now final. As to my title; it is clear, my position and interest are quite distinct, indeed opposed to the Assignees.

THE HONORABLE H. KŒNIG for the purchasers Boulé and wife.

My position is a most favorable one. I attended a Judicial sale with my deposit ready the Estate was awarded to me, and I have paid a very large instalment of the price. The Master, in his discretion, refused a delay. He was quite right for the result of those delays has frequently been that a much less price was ultimately got. The point of law is regulated by Section 88 of the Bankruptcy Ordinance. The intention of the legislature was clearly to introduce the ordinary Rules of selling adopted in judicial sales generally but not the special ones applicable to minor's estates. These latter stand in a position quite peculiar. The family Council can give or withhold its consent, but in Bankruptcy there must be a sale. The Master a high Officer in this Colony by law "conducts and manages judicial sales." He has accordingly a wide field of discretion open to him. He is a Court, a Tribunal, and in many respects, as we all know he has the attributes and power of the former Court of first instance. That the price I paid was a fair and good one is shown by the fact of no *Surencherisseurs* having appeared though both classes of outbidders might have taken the field.

MR. G. COLIN in reply. The figures put forward on the other side are quite fallacious. On both Estates there was a very serious loss by selling at such low figures, but particularly on "*Avenir*". The Master is a mere ministerial officer in carrying through such sales. He has no power or authority of himself. It would be very dangerous to give him such powers to overrule the sellers, whose buisiness it is to attend to every thing. This is an important question of principle and therefore the amount of money lost really does not enter into the question. In all those cases there is invariably a valuation by an *Expert*. This is required by Article 824 C. C. and the Articles of the Code of Civil Procedure regulating the sales of immoveable property 953 &a. It is said our Appeal is wrong in form, but it is plain that my appeal against the final adjudication covers and includes all the preliminary orders of the the day. This is the Rule as to Appeals of all final Judgments. Merlin Appels. Page 61. Page 4. Section 1.

The special capacities bestowed on the Master by the Bankruptcy Ordinance, in the absence of the Commissioner dont come into operation here. How then can the Master oust the Commissioner. He is plainly his mere delegate. He should have gone back to the Judge, who on hearing the matter would undoubtedly have ordered a new *expertise* and a re-exposure of the Estate, and in some way or other would have protected the rights of the Assignees acting for the mass of the Creditors. Minors are amply protected in the sale of the estates by the law which throws around them the shield of the family Council and the Ministère public; are the Creditors of Bankrupts who require it at last equally to have no protection against the decision of a mere officer of the Court, however respectable.

The Code of Commerce is the law of this Colony in all questions of this description excepting so far as expressly abrogated by the Bankruptcy Ordinance. The Rules of the former must therefore receive effect. Dwarris on Statues Page 658—699—700. The meaning of the Ordinance in Section 88 is clearly that in such sales, the forms of the sales of minor's estates should be observed. That was the form then in use in cases of Bankruptcy. It could not mean other judicial sale, like licitations, for if so the proper name would have been given to the thing i e; the proceedings in licitations would have been enjoined.

JUDGMENT.

The question, between the parties here, is one of importance, and apparently this is the first time it has been fully argued before the Court.

We cannot go along, with, the Respondents, in the objections to the form of the Appeal. We are opinion that the Appeal, against the final adjudication to the purchaser, brings up the whole matter.

On the merits of the case, if it is the law of Mauritius that, in sales of the real Estate of Bankrupts, no adjudication to a purchaser can be made, under the price at which the subjects

have been valued by the appraiser, *cadit quæstio*; for that law is equally binding on the Supreme Court, the Commissioner in Bankruptcy, and the Master. In such a case a lower upset price would require to be fixed, and the subjects exposed of new, after the necessary delays and advertisements. This is the course followed in some other countries and, undoubtedly, it has much to recommend it.

But, in Mauritius, many such Estates have been sold by the Master, at judicial sales, under the value put upon them by the appraiser; this however has usually taken place when no one objected. At the same time, if the law is positive, that the valuation price must be reached, and that the Master has no discretion, the sales which have been made in contravention of the law, altho' without objection at the time, might, in some cases, be exposed to future challenge, leading to great and serious difficulties; let us then, in the first place, enquire particularly what the colonial law, on the subject, really is.

The enactment of the Bankruptcy Ordinance is positive and express, that, if there is no *expropriation forcée*, the forms observed in judicial sales shall be allowed. Now, judicial sale is, undoubtedly, a generic term, and embraces several species, such as sales by licitation, sales of successions held under inventory, sales of Estates of minors, &a. The forms vary in these different cases, the mode of procedure in the last class is the most strict and minute. Minors may be said to be eminently the favourites of the law, or rather, to speak more correctly, the law knowing their helplessness and the frauds to which they are exposed, has fenced their Estates with many safeguards, so as to preserve them, if possible, for the minors themselves, and not to permit their alienation, except after a number of minute and unbending precautions.

Some of the reasons for this strictness apply to the case of sales of Bankrupts' Estate; but, by no means, all of them, and therefore it would not be surprising if the Colonial law, which at one time required the same formalities in both cases, should have some reason to grant a relaxation to a certain extent.

It must not be overlooked that this rigid strictness has never been enforced, except in the cases when all parties concerned were in minotory. Where only some of them were under age, those rules of procedure have been applied. It is a very fair observation, by the Respondents' Counsel here, that if the legislature had intended to subject the Rules of Bankrupt Estates to all the formalities required in only one species of sale, or rather in a subdivision of that species, the Ordinance would have said so in direct and positive terms. But it has only said that the forms of Judicial Sales, generally, shall be observed; and, under such general instructions from the legislature, the Court would not be warranted to enforce the observance of rules applicable only to a special sub division of case.

But the argument admits of being put in a light still stronger. The clauses, both in the Ordinance 1838 and 1853, are derived from the older law of the Code de Commerce, Art. 564; and, in both, the words: "Suivant les "formes prescrites pour les ventes des biens "des mineurs;" are changed into the words, "according to the forms prescribed for the "Judicial Sale of real Estates." This is a positive and distinct change of the law.

Then, look at the actual practice, since the establishment of the Courts on their present footing. The Commissioner, to take the words of the proceedings in the present case, "grants "the Assignees authority to take the legal "steps and make the legal proceedings and "applications for prosecuting the sale of those "Estates," that is, authority to go before the Supreme Court, represented by one of its Judges, sitting at Chambers, who issues a Rule, ordering a valuation of the Estate to be made, in order that the Judicial sale thereof do take place before the Master of the Court. The proceedings are no longer in the Court of Bankruptcy; they are in the Supreme Court, and, so far as the sale is concerned, in the hands of a department of that Court, headed by the Master, to whom the legislature has entrusted, *inter alia*, the special jurisdiction "to conduct and manage" those sales.

This Officer, by the law of the Colony, has many of the Judicial attributes of the late Court of First Instance; and, in such circumstances, we cannot accede to the argument of the Appellants that he has no discretion whatever, in letting the Estate go, at a price lower than the valuation of the appraiser. This is no doubt an onerous and delicate discretion; but one with which the Supreme Court will not readily interfere, though, of course, we must be prepared to rectify any proceedings which should appear to us to operate a plain and palpable injustice to any party connected with the Estate, or with the sale.

In the present case, we do not feel ourselves called upon to interfere with the discretion which the Master has exercised. The prices, though not fully equal to the valuations, are large and substantial. Looking at the additional expenses, which are necessarily accumulating from day to day, and the risk of a lesser competition among bidders, to annul the sale and order a fresh exposure, would, we think, be an experiment attended with hazard to the interest of the creditors.

The Appeal is therefore dismissed, but without costs.

Supreme Court.

DIVORCE POUR CAUSE D'ADULTÈRE,—COD. CIV. ARTS. 229, 298, 309.

En matière de divorce, la preuve positive des faits allégués doit être soumise à la Cour.

La Cour, en accordant le divorce, peut prononcer la peine de l'emprisonnement contre la partie condamnée, bien que celle-ci ait déjà fait un mois de prison, sur un jugement du Magistrat de District, pour d'autres actes d'adultère commis avec le même individu.

La Cour peut ordonner l'emprisonnement bien que le Plaignant demande qu'il ne soit point fait application de cette peine.

DIVORCE FOR ADULTERY.—C. CIV. ARTS. 229, 298, 309.

In cases of divorce, positive proof of the guilt must be submitted in the case itself.

The Court, in granting the divorce, may order the Defendant to be imprisoned, although she had been already sent to jail, for one month, by the District Magistrate, for other acts of adultery, with the same man.

The Court may award imprisonment, although the husband moves that it be not added to the Divorce.

Number of Record: 7207

LEFÈVRE THE HUSBAND, Plaintiff.

versus

LEFÈVRE THE WIFE, Defendant.

Before:

His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2. P. J.

J. L. COLIN,—Of Counsel for Plaintiff.
W. FINNISS,—Plaintiff's Attorney.
G. B. COLIN,—Of Counsel for Defendant.
V. LAVAL,—Defendant's Attorney.

9*th. September* 1862.

This was a suit, at the instance of the husband, a merchant's clerk, against his wife, on the ground of adultery.

J. L. COLIN, for the Plaintiff: On an Information, sworn by my client, before the District Magistrate, charging his wife with absconding from the conjugal roof, and living in adultery with one Théodore Wilman, those two persons were apprehended by the Police, and tried before the Magistrate. They were found guilty, and sentenced to one month's imprisonment each. I propose, in proof of the adultery, in this action of divorce, to produce a certified copy of that Conviction.

G. B. COLIN, for the Defendant: I am not in a condition to dispute the fact of adultery here, and I shall admit the proceedings that took place before the Court below.

THE COURT: In a case of this description, we cannot dispense with positive proof led before this Court. For many and obvious reasons, we cannot accept any admission, or take any thing for granted. But you can, in addition to proof led before us, put in the Conviction, and any other papers, after proving them in the usual way.

Repeated acts of adultery, within the conjugal residence, were then proved by two witnesses, and a duly certified copy of the Trial and Conviction, before the District Magistrate, was produced in evidence.

J. L. COLIN. Having established this woman's guilt, I move for Judgment of divorce; but as she has a young child, and has already been confined one month in Jail, I trust the Court will dispense with farther imprisonment.

S. J. DOUGLAS, SUBSTITUTE PROCUREUR AND ADVOCATE GÉNERAL, gave his conclusions for the divorce, and added:

I do not think I would be discharging my public duty if I were not to move for the imprisonment of this woman. I have spoken to the Procureur General and he takes quite the same view.

G. B. COLIN, on behalf of the Defendant: I submit that, in the circumstances, farther imprisonment cannot be competently awarded.

To do so would be to punish her twice for the same offence. Imprisonment is not an indispensible part of the Judgment, in such a case as this. Thus when the Ministère Public has omitted to ask for imprisonment the Court does not award it. (14 May 1829. SIREY 31: 2:76.) The husband does not press for it here, and, in such case, his attitude is all important, as without his active initiative the proceedings cannot take place at all. (SIREY. Cour. Cass, 1816: 1: 4. Page 47. LEGRAVEREND, "*Legislation Criminelle.*" Page 47. BOILEUX on Article 308 Civil Code.)

THE COURT: It may well be that, where the Procureur General does not move for imprisonment, that punishment is not added by the Court. The words of Article 308 are:

"La femme, contre laquelle la séparation
"de corps sera prononcée pour cause d'adul-
"tère, sera condamnée, par le même juge-
"ment, et sur la requisition du Ministère
"Public, à la réclusion, dans une maison de
"correction, pendant un temps déterminé,
"qui ne pourra être moindre de trois mois, ni
"excéder deux années."

But here the Ministère Public does make the motion.

Again it is urged, and at the first glance, with some shew of reason, that, to award imprisonment here, would be to punish this woman twice, for the same offence; would be to give sentence *bis in idem*. But this

is not the case. The Defendant has been proved guilty of adultery, on repeated occasions, with this person Wilman, within the conjugal domicile, and in circumstances of more than usual aggravation. She was tried, convicted, and punished for deserting her residence, and living elsewhere with this paramour. The acts of adultery therefore are quite distinct and separate, as to time and place.

It is true, the husband's attitude, in these cases, is of importance, but his request, in the present form, is not obligatory on the Court. By article 309 Code Civil, under the title: " De la séparation de corps, " it is said :

" Le mari restera la maître d'arrêter l'effet "dela condamnation,en consentant à reprendre " sa femme. "

But nothing of this kind occurs in this present case.

The Court, therefore, admits the divorce prayed for by the Plaintiff, and authorize him to appear, according to law, before the Officer of the Civil Status of Port Louis, in order that the divorce be pronounced by the said Officer; and condemn the Defendant to 12 months reclusion, in the Jail of Port Louis.

Supreme Court.

ACTION EN BORNAGE,—C. C. ART. 646.

Lorsqu'il s'élève, sur une action en bornage, des questions importantes de propriété ou de possession, celles-ci doivent être décidées préalablement ; au moyen d'une action distincte et séparée, avant que la ligne de division ne soit tirée et les bornes placées.

SETTING OF BOUNDARIES BETWEEN ESTATES, —C. C. ART. 646.

When there arise serious questions of right and possession of lands, these must be first determined, and this, usually, in a distinct suit; before the line of division and the march stones are fixed.

Number of Record : 7120

TARGET, Plaintiff.
Versus.
ROUSSEL & Ors., Defendants.

Before :
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL, 2nd P. J.

S. J. DOUGLAS,—Of Counsel for Plaintiff.
J. BOUCHET,—Plaintiff's Attorney.
G. B. COLIN,—Of Counsel for Defendants.
F. ROBERT,—Defendants' Attorny.

9th. September 1862.

In this case the Plaintiff stated that he had, some time ago, by purchase, become the owner of an Estate called *Roche Noire*, in the District of Moka, at the place called "Pailles," and that, in the deed of sale, the said Estate was described as bounded, on the West, by the property of the late Roussel, who is now represented by the Defendants as his heirs. The Plaintiff farther set forth that, in the deed of sale to him, the bounderies of *Roche Noire*, more especially where it adjoined the land of the Defendants, were described in a general manner, but that the boundary line was clearly laid down, in certain older title of the Defendants, lands, and certain other papers relative thereto. That, being now desirous of having his property surveyed, he sent Léonce Dubreuil Hily Esq., Sworn Land Surveyor, to draw up the said Survey, after giving notice to all the *voisins limitrophes*, and among others, to the Defendants. That when the Surveyor proceeded to make the survey, and establish the bounderies, the Defendants, or some of them, appeared and objected to a Survey being made and stated that, according to one of the said older titles, the boundary line between the properties of Plaintiff and Defendants, is the St Louis stream, and that, accordingly, the Surveyor was obliged to suspend his proceedings.

The Paintiff now craved the Court to appoint the said Hily, or some other Surveyor, to proceed, contradictorily, to make a Survey, and lay down the boundaries, regard being had to the titles of parties and particularly to the holder of the Defendants, deeds above referred to.

The Defendants pleaded: That the said Plaintiff has no right to enter this action against the Defendants, the said Plaintiff not being one of the owners of an Estate bordering on the Defendants, property. That the boundary lines of the Defendants' property are satisfactorily pointed out, in their title deeds, and shew that the line between the Plaintiff's property and the Defendants, property, is the St. Louis stream. That the St. Louis stream has, since more than 30 years, been boundary line between the Plaintiff's and Defendants' properties. That the said Plaintiff has no interest whatsoever to enter this present action, he, the said Plaintiff, in no way complaining, or alleging, that he has not the quantity of land sold to him by his vendors; and the Defendants say that, for more than 30 years, they, by themselves or the previous owners of their said property, have been in quiet possession and enjoyment, *animo domini*, of their actual property, according to the boundary lines set forth in their title deeds. Therefore the said Defendants pray that the said Plaintiff be dismissed from his action, with costs.

After some discussion, the Court allowed the Defendant to state, more explicitly, a

Demurrer to the form of the action. They then pleaded that the Declaration is not sufficient in law. (1) Because the said Plaintiff has not entered against the said Defendants any action in revendication of lands, and (2) Because the Court has no Jurisdiction over the matter submitted to their decision, according to the Plaintiff's Declaration.

G. B. COLIN, in support of Demurrer. (*Reads pleadings.*) This is plainly not an "*Action en bornage*; it is truly a revendication of property. There never were any bornes or stones here to place. There can be no Survey till the Plaintiff establishes his rights. (SIREY 18.2.100.—30.1.158.—SIREY (N. L.) 7.2.59. —Article 646. C. C. and GILBERT's Notes.)

S. J. DOUGLAS, for Plaintiff. I followed the only course open to me. I say a considerable piece of ground, of many acres, beyond the St. Louis Stream, belongs to me. Formerly, being covered with stones it it was of little value, but the prosperity of the Colony has now made it an object of great importance. I ask two things: (1.) That the Court shall appoint a Surveyor, (2.) That he shall be ordered to make Survey, in terms of the titles.

In answer the Defendants raise a distinct issue of fact, that must be disposed of. There is no room for a Demurrer here, after the statement of such pleas. The facts of property and possession must be first established. (MERLIN, "*Bornage*" Sec. 2 and Sec. 4. Court of Besançon. 1828. Page. 10: 3rd Considérant.) I ask the authority of the Court to send a Surveyor, which we cant do ourselves. We have nothing to do with the later changes of the law, in France. The Court has clear Juriadiction in a case like this. (MARCADÉ. Volume 2,464.) Such a suit is not for the Juge de Paix, or our corresponding Officer, the District Magistrate. I refer farther to DALLOZ "*Bornage*" Sec. 2, Articles 10. 18 and 19. TOULLIER. Volume III. No. 178. BIOCHE. "*Servitude.*" Boruage."

G. B. COLIN, in reply: It is obvious that the Plaintiff wishes to go by a sidewind instead of a straight forward course, by making a clear and distinct allegation, in a separate writ. To my demurrer, right or wrong, I have of course added pleas on the merits, as I was obliged to state all the gronds of law I had, whether preliminary or not. The Plaintiff must establish his case. In the case cited from *Besançon*, there was no point of property, besides that decision must fall before the Judgments of higher Courts.

JUDGMENT.

In the fixing of disputed boundaries, between contiguous landed estates, there are three stages of procedure which necessarily follow each other, in order. *First.*—The ascertainment of the exact nature and extent of the rights of the parties in dispute. *Secondly.* —The *delimitation*, or drawing the line between them. And *Thirdly.*—The placing of the *bornes* or march stones.

In some cases, from the agreement of parties or the unimportant nature of their differences, a report of a Surveyor may be ordered, at once, which may enable the Court to remit, to get the *bornes* fixed. In the present case, however, from the pleadings and statements of parties, it is clear that important questions, both of fact and law, have to be decided, before the second stage of *delimitation* can be reached.

Questions of property, arising from title as well as possession, must be decided in the first place. Therefore, it is plain that the case is not one for the District Magistrate; and the part of the Demurrer about jurisdiction must fail. But, secondly, in such a state of matters, any remit to a Land Surveyor, in the meantime, is altogether premature. The work must be done in this Court, for, as DALLOZ well remarks, Section 40:

"La question de propriété, une fois engagée devant le Tribunal de Première Instance, doit être jugée conformément aux règles ordinaires du droit. A l'appui de leurs prétentions, les parties peuvent, en cette matière, comme en toute autre, invoquer la preuve littérale, la preuve testimoniale, l'aveu et le serment."

So PARDESSUS says: "Dans ces cas, où les parties ne se trouvent pas d'accord sur les bases du bornage, les opérations des experts doivent être suspendues, jusqu'à ce que les tribunaux aient statué. (BORNAGE No. 124.)

The only point, for present determination, therefore, is this: Shall this judicial enquiry take place under the present suit, or in a separate and distinct action?

We think, in the latter from.

The present demand is merely to have a Survey made, and, to engraft those issues of property upon it, would neither be logical nor convenient. The Plaintiff, therefore, if so advised, will set forth, in a principal action, on the case, the facts which he considers material for the enquiry, and distinctly specify the land which he really claims as his property, with the limits and boundaries of the same, and he will ask the Court to find and declare that, up to such limits and boundaries, the subjects are his property.

When these questions, which lie at the root of the whole matter here, are determined, it will be time enough to proceed to the *délimitation* and the *bornage*. In the meantime the present suit, in which the laverments of parties are so far recorded, will not stand

dismissed, but will be listed, to abide the result of those other enquiries.

All questions of costs reserved.

Bail Court.

VENTE DE MARCHANDISES,—PREUVE,—TENUE DE LIVRES DE COMMERÇANTS,—C. DE COM. ARTS. 8 & 17.

SALE,—PROOF OF GOODS SOLD AND DELIVERED,—MODE OF KEEPING MERCANTILE BOOKS IN MAURITIUS,—COM. C. ARTS. 8 & 17.

Number of Record: 3360

GOUDIN & COUTANCEAU, Plaintiffs.
Versus.
DUGUESCLIN, Defendant.

Before:
His Honor the CHIEF JUDGE.

J. ROUILLARD,—of Counsel for Plaintiffs.
J. GUIBERT,—Plaintiffs' Attorney.
L. ROUILLARD,—of Counsel for Defendant.
E. BOULLÉ,—Defendant's Attorney.
25th September 1862.

This was a demand for $368,02, as the price of goods sold and delivered, during the period from December 1858 to October 1859. Both parties were, at the time, traders.

The defence was a general denial of the debt. The Defendant, examined on interrogatories, admitted that he had bought goods from the Plaintiffs, in 1858 or 1859, to a considerable amount, that he could not say what the total value was, as he never kept any books, he stated that, when he paid any money to the Plaintiffs he always took receipts. He produced certain receipts for the amount of which the Plaintiffs had allowed credit in the present demand, but he produced no other receipts. He added that a clerk of the Plaintiffs (one Noël) had called on him, that he had shown him (Noël) some accounts receipted which were not borne on the Plaintiffs' books, that Noël had gone away, saying all was right.

It was in evidence that the Plaintiffs had written to the Defendant, before raising this action, asking him to call at their office for the purpose of verifying their accounts, as they were persuaded that their clerks had committed some mistakes. The Defendant stated that he had accordingly called, but that the Plaintiffs had not given him access to their books.

One of the Plaintiffs' clerks stated that he had personnally sold and delivered, to the Defendant, the greater part of the goods now sued for, and had personnally seen the delivery orders issued for the other articles; farther that all the items were regularly entered in the Plaintiffs' books of business, which were produced in Court. The witness said that when he produced the account to the Defendant for payment, the latter stated that he had already paid part of it, and he came often to the Plaintiffs' office about the matter. The Plaintiffs never gave any written order or receipt for the goods in question.

J. ROUILLARD, for Plaintiffs, contended: My case is clearly proved. I produce my books regularly kept and I offer the Plaintiffs' oath, in terms of Articles 8 and 17 of the Commercial Code; this is conclusive.

L. ROUILLARD, for Defendant: The Plaintiffs' books are not paraphed, in terms of law, and therefore they are not evidence for them. (C. Com. Article 12.) My client was a very small trader, and kept no books. The Plaintiffs remain silent all this time, which shews a want of confidence in their case. The Defendant was not allowed to verify the books when he went to the Plaintiffs, on their own invitation; and where are the other clerks of that establishment who must have known about this sale and delivery?

JUDGMENT.

It appears to the Court that this claim is sufficiently proved. A course of dealing, at the period in question, is admitted by the Defendant. One witness swears positively to the sale and delivery of the articles, and the Defendant himself says that when he paid money he always took receipts, and he has produced none beyond those for which credit has been allowed by the Plaintiffs. The Defendant admits that he kept no books, a very unfavorable feature in any case, while the Plaintiffs, books produced in Court contain the entries of the goods. The general regularity of these books is not disputed, but it is said that, not being paraphed, they are not evidence, by the law of this Colony. It appears to the Court that there is enough of materials for the decision of the present case, without relying on the Plaintiffs' books; but if the later usage of merchants in Mauritius, as to the keeping and paraphing their business-books, as is frequently stated in this Court, is not in conformity with the written law of the Colony, it might certainly be well if they would put themselves in communication with the proper authorities to have the law on the subject of business-books placed on a clear and satisfactory footing.

Cases of this description, where the sale and delivery of goods, is denied by the alleged purchaser are very common in Mauritius. Some evidence, in writing, by a jotting or memorandum, made, at the time, would save much litigation.

Judgment for Plaintiffs with costs. Interest at 12 per cent. Imprisonment limited to 3 years.

Supreme Court.

LOUAGE D'OUVRAGE;— SALAIRE, — PREUVE TESTIMONIALE.—C. C. ART. 1779 & 1341.

Le contrat verbal par lequel un marchand s'est assuré les services d'un commis peut être prouvé par témoins, bien que le montant de ce contrat excède 150 *francs.*

CONTRACT OF HIRING LABOUR AND SERVICES. —SALARY,—ORAL PROOF,—C. C. ART. 1779 & 1841.

A Contract of hiring, by a shopkeeper, of the services of a clerk, to assist him in his establishment, may be proved by witnesses, though the amount is above 150 *francs.*

Number of Record. 8302

BUCKMULLER, Plaintiff.
Versus.
MAUREL, Defendant.
Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BERTEL, 2nd P. J.

C. M. CAMPBELL.—of Counsel for Plaintiff.
F. MALLET,— Plaintiff's Attorney.
G. B. COLIN,—of Counsel for Defendant.
P. E. DE CHAZAL,—Defendant's Attorney.

9th September 1862.

In this case the Plaintiff, designing himself merchant's Clerk, asked Judgment against the Defendant, described as, " merchant and general dealer, " for the sum of $ 660, being " the amount of an account for eleven months " salary, due to the Plaintiff by the said " Defendant, as clerk in the employ of the " said Defendant, for his trade, at the rate " of $ 60 a month ; interest, at the rate of " 12 per cent was also concluded for, and " personal execution against the Defendant, " this being a commercial case. "

The Counsel for the Plaintiff having called a witness:

G. COLIN, for Defendant, objected to parole evidence, submitting that the amount sued for is far above the sum allowed by the Civil Code to be established without writing. (Article 1341.)

He further contended that the alleged contract here is not really of a commercial nature ; that it is a mere ordinary contract of hiring labour and services. Regard must be had to the real nature of the pretended agreement, not to the position in life of the parties. (SIREY 30 : 2 : 15.—30 : 2 : 85.—39 : 2 : 525.—43 : 2 : 193.—36 : 1 : 34.—41 : 2 : 15.—43 : 2 : 192. ROGRON's notes on Article 634 of Commercial Code.)

CAMPBELL, for Plaintiff. This is a pure commercial question. The hiring, by a Shop-Keeper, of a clerk to work in the shop, at the business of his trade, is a plain commercial act.

See GOUJET & MERGER, *Dictionnaire du Droit Commercial.* " Commis. " Sec. 2, Article 26. " Compétence. " Article. 105.

THE COURT: This is a practical question of importance, on which considerable diversity of authority is found to exist. It is proper to have it settled. We agree with the writers who are of opinion that the hiring of the services of a clerk, by a merchant, for the use solely of his business, is an act of commerce, or cognizable by commercial tribunals, and may, accordingly, be established by parole proof.

In the Commercial Dictionary of GOUJET AND MERGER, as quoted by the Plaintiff, it is expressly said : " Les commis ont également " le droit de traduire leur patron devant le " Tribunal de Commerce, pour obtenir le paie- " ment de leur salaire, et le remboursement " des sommes qui peuvent leur être dues, à " raison de leur gestion," and the same doctrine is repeated elsewhere, in the same work.

In PARDESSUS, *Droit Com. Page* 280. We read : " Les engagements, entre les commer- " çants et leurs employés, sont des louages de " services ; et comme ils ont pour objet le " trafic ou le commerce, la connaissance des " contestations qui en resultent, est attribuée " à la jurisdiction commerciale, sans qu'on " puisse dire, comme nous l'avons fait remar- " quer, Nos. 33 et 35, que, par leur nature, ils " soient, à proprement parler, des actes de " commerce." (Comment. on Article 635, C. Com. supported by an *Arrêt* of Cassation of the 11*th Vandemiaire an* 10.)

In the present suit, looking at the admitted position of the parties, as shopkeeper and clerk, and the steady inclination of later times to relax the rigid rules of exclusion of evidence, particularly in commercial matters, we think this exposition of the law is to be preferred. And we shall, therefore, allow the Plaintiff's witnesses to be heard. At present, we need not say that the Court decides nothing more.

Costs reserved.

Bail Court.

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—COMPÉTENCE,—ORD. No 35 DE 1852.

Bien qu'il ne soit permis de faire appel d'un jugement de Magistrat de District (Partie criminelle) que lorsque la condamnation excède un mois d'emprisonnement ; cependant la Cour

entendra l'appel s'il porte sur la compétence du Magistrat.

APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE,—JURISDICTION,—ORD. 35 of 1852.

Although an appeal from a District Magistrate (on the Criminal side) is allowed only where the imprisonment exceeds one month, if the jurisdiction of the Magistrate is impeached the Supreme Court will examine the proceedings.

Number of Record : 156.

BOCARD & Anor, Appellants.
Versus.
THE QUEEN, Respondent.

Before:
His Honor the CHIEF JUDGE.

G. B. COLIN,—of Counsel for Appellants.
C. LABORDE,—Appellants' Attorney.
S. J. DOUGLAS, of Counsel for Respondent.
J. BOUCHET,—Respondent's Attorney,

25th. September 1862.

This was an Appeal from a Conviction of the District Magistrate of Flacq.

The Appellants had been charged, by Dubreuil Hily, Acting Government Land Surveyor, with having, on 7th. May last, along with a body of Indians, at Camp de Masque, in the said District, illegally and unlawfully cut and taken away a quantity of timber, on Government property, and also with trespassing on same property.

The defence was that the ground did not belong to Government, but to the father of the accused, under a lease from the proprietor.

The Appellants were convicted and sentenced to 3 days, imprisonment with costs.

Primâ facie, in such cases as this, where the imprisonment does not exceed one month, there is no Appeal to this Court. (Section 12th of Ordinance No. 35 of 1852.) But the Appellants complained so strongly of the incompetency and irregularity of what had taken place below, affecting even the jurisdiction of the Magistrate, that the Court has felt itself bound to look carefully through the whole procedure.

The Record shews that a number of witnesses were examined before the learned Magistrate, who had also submitted to him certain plans of the locality, both of an old and of a late date. He had also the evidence of Sworn Land Surveyors. But further the Judge ordered all parties interested in the ground to attend, on the spot, on a fixed day. On that occasion, the Magistrate, with the assistance of Mr. Frogeraye, Land Surveyor, on oath, inspected the locality. He had no difficulty, on examining the ground, and the land marks thereon, in ascertaining that the subjects, of which the father of the accused is tenant, and which, in his lease, are stated as amounting to 317 acres 46 perches, could be positively distinguished, and that, at a considerable distance from the spot, where the accused are charged with taking wood and trespassing, the ground where the trepass was committed, was Government ground, and clearly not within the part of the forest to which the Appellants, acting under their father's orders, had any right. The measurement of their ground was fixed, as we have seen, by their own titles, and it could be positively distinguished and set off. Probably, in the circumstances, a punishment by fine, would have been as suitable as a punishment by imprisonment. But the District Magistrate having exercised the discretion conferred upon him by the Penal Code of the Colony, this Court will not interfere.

The Appeal is therefore dismissed, with costs.

Supreme Court.

APPEL DE LA TAXE DU MASTER,—HONORAIRES DE L'AVOCAT.

APPEAL FROM TAXATION OF THE MASTER,—COUNSEL'S FEES.

Number of Record: 7125 & 7126.

ORIENTAL BANK CORPORATION,
[Appellant.
Versus.
OVEREND GURNEY & Co., and Ors.,
[Respondents.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2nd. P. J.

S. J. DOUGLAS,—of Counsel for Appellant,
W. HEWETSON,—Appelant's Attorney,
H. KŒNIG,—of Counsel for Respondent.
E. DUCRAY,—Respondent's Attorney.

26th. September 1862.

(Vide Supra P. 81.*)*

This was a motion to have the taxation, by the Master, of the Bill of Costs of the Oriental Bank reviewed.

The Bank was found entitled to costs. They had paid their Counsel a fee of one thousand guineas for the two cases of *Queen Victoria* and *Woodford*. The Master, for both cases, which were determined on one argument, by Counsel, had allowed only one hundred guineas, as against the losing party, Overend

Gurney and Co. The Court was now moved for a remit to the Master, to reconsider his Judgment, with a view of allowing a larger fee, as against Overend Gurney and Co.

THE COURT said: This case was certainly one of importance and very fully argued. Looking at the fees usually paid to Counsel in Mauritius, we should not have been surprised if the Master had allowed a somewhat larger fee, as against the party who succumbed; but the Court will not readily interfere with the discretion which their own Officer, a person of long and extensive experience in this Court, has exercised. This is the rule in England. (ARCHBOLD's *Practice*, Page 495.) and is indeed a rule which must prevail every where, in similar circumstances. With the amount of the fee paid by a litigant to his own Counsel the Court cannot interfere. Whether, in the present case, the payment by the Bank of a large fee to its Counsel, was an act of judicious liberality or of wanton profusion, it is not for us to say. That is a matter beyond our province. Our duty is simply to approve or disapprove of the Judgment of our own Officer, dealing with a matter of taxation as between party and party.

We do not see sufficient grounds for interference.

The Appellants will therefore take nothing by their motion.

Bail Court.

APPEL D'UN JUGEMENET DE MAGISTRAT DE DISTRICT,—EXCEPTION DILATOIRE,—NULLITÉ COUVERTE PAR LA DÉFENSE AU FOND,—ARTS. 173, ET 186 DU C. DE P. C.

APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE,—AT THE TRIAL OF A CASE, AFTER THE MERITS ARE ENTERED UPON, PLEAS OF A DILATORY OR PRELIMINARY NATURE CANNOT BE ENTERTAINED,—ART. 173 & 186 OF C. OF C.P.

Number of Record: 287

AUTARD DE BRAGARD, Appellant.
Versus.
BÉLIN, Respondent.

Before.
His Honor the CHIEF JUDGE.

G. B. COLIN,— of Counsel of Appellant.
A. J. COLIN,—Appellant's Attorney.
E. PELLEREAU,—of Counsel for Respondent.
C. LABORDE,—Respondent's Attorney.

26th September 1862.

The Respondent Bélin, a late Sanitary Inspector for the Local Board of Health of Pamplemousses, sued the Appellant Autard de Bragard, as President of the said Board, for the sum of £47.12s., the balance of salary alleged to be due to him.

The Plaint was entered in the District Court of Port Louis. When the case came on for hearing, the Defendant did not appear. Bélin stated his case, but not being prepared with the whole of his proof, farther proceedings were delayed till a subsequent day. On the day named, Bélin attended, and, by leave, a third party was allowed to appear for the Defendant, Mr. Autard de Bragard, who then proposed to put in a preliminary Defence.

The Court decided that it was too late to open such a defence. On the merits, the justice of the claim was not disputed, but time was asked till the funds came in. Judgment was given for Plaintiff. Defendant appealed.

G. B. COLIN for Appellant, contended that the objection which his client wished to raise, in the Court below, being one that would have prevented the case being heard altogether, it could not be too late. By law, a certain preliminary notice, before raising the action, was ordered to be given to the Defendant. Without that, there could be no action at all.

PELLEREAU, for Respondent. The defence was clearly one not touching the merits, but distinctly of a preliminary nature. The time for taking such points was long past.

THE COURT: At a trial of a cause, after the merits are entered upon, it is a general rule of all legislation, that pleas of a dilatory or preliminary nature cannot be entertained. The time for their competency is passed. This Rule is well stated in Articles, 173 and 186 of the Code of Civil Procedure. The plea now proposed is one that affects merely the present suit or plaint. It does not touch the merits. It is plainly one of a prejudicial description and was too late in being stated.

Appeal dismissed, with costs.

Supreme Court.

APPEL D'UN ORDRE DU JUGE DÉLIVRÉ DANS LA CHAMBRE DU CONSEIL,—COMPÉTENCE DU JUGE EN CHAMBRE,—PROCEDURE.

Il n'est pas nécessaire de s'adresser à la Cour pour rendre définitif un Ordre du Juge delivré en Chambre.

En matière de licitation l'Ordre du Juge qui réfuse une semblable demande n'est pas soumis à la voie d'appel, mais une nouvelle demande doit être présentée à la Cour.

APPEAL FROM A JUDGE'S ORDER IN CHAMBERS, —JUDGE'S JURISDICTION,—PROCEDURE.

It is not necessary that a motion should be made in Court for the purpose of making absolute a Judge's Order given in Chamber.
In matter of sale by licitation an appeal is not permissible from a Judge's Order refusing the same; in such cases a new application may be made to the Court for an original Order.

Number of Record: 8612

MANIACARA,—Appellant.
versus
LECLERC,—Respondent

Before:
His Honor the CHIEF JUDGE and,
The Honorable N. G. BESTEL 2d P. J.

G. B. COLIN,—of Counsel for Appellant.
A. J. COLIN,—Appellant's Attorney.
E. LECLÉZIO Senior,— of Counsel for Respondent. Respondent's Attorney.

26 *th September* 1862.

On the 12th day of August last, LECLÉZIO Senior moved that the Judge's Order, dated the 14th July ultimo, dismissing an application for licitation, should now be made a Rule of Court.

This motion was resisted by COLIN who, on behalf of Ayacanou Maniacara, had lodged an Appeal from the said Judge's Order.

Parties fully heard, the COURT took time to consider the two following questions, namely:

1o. How far it is necessary, under Ordinance No. 24 of 1855, (Chamber's Ordinance) and for the subject matters of the said Ordinance, that a motion should be made in Court for the purpose of making absolute a Judge's Order.

2o. Whether an appeal is permissible, from a Judge's Order, in matters left by the above Ordinance to the final decision of the Judge.

JUDGMENT.

True it is that, in England, "When it is "proposed to enforce a Judge's Order, by "attachment, or by any other act of Court, "it is *indispensably* necessary that it should "be previously made a Rule of Court." (BAYLEY'S *Chamber's Practice*. Page 31.)

The 2nd. Article of the Chamber's Ordinance, regulating the matter before us, appears to us, to have clearly departed from the English Practice, in that it requires no motion for the purpose of making absolute a Judge's Order.

The Article runs thus: "The matters set "out in the Schedule to this Ordinance an-"nexed may, subject to the discretion of a Jud-"ge in any particular case, to refer the same to "the Court, be henceforth *finally* disposed of, "at Chambers, by a Judge's Order."

Application for licitations are matters which a Judge, at Chambers, has a right finally to dispose of, when seeing no reason for referring the matter to the Court.

The same Article next provides for the mode of making absolute the Judge's Order, which "Judge's Order," it is therein stated, "shall be a sufficient authority, to the Registrar of the Court, to issue thereon a Rule of Court *de plano*," agreeing in this with the English Practice, which requires the production of the original Order upon which the Officer draws up the Rule.

On the one hand, no motion is required by the Article above quoted; and on the other hand, the Ordinance provides that the production of the Order to the Registrar is a sufficient authority to this Officer to issue a Rule of Court *de plano*.

Instead of an Appeal, recourse should have been had, in this Case, to the English Practice which is this: "When an Order is refused, by "a Judge, the Applicant, if dissatisfied, should "apply to the Court, not for the revision of "the Judge's Order, but for and original "Order." (CHITTY, ARCHBOLD *Practice*. Page 1444.) The Judgment of the Court therefore is that the Plaintiff do take nothing by his motion, and the Appeal be and is accordingly dismissed with costs.

Bail Court,

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—FONCTIONNAIRE PUBLIC,—OUTRAGE,—C. PÉNAL ARTS. 156.158. 160.—ORD. No. 35 DE 1852, SEC. 102.

Le Trésorier de la Municipalité ne fait point partie des fonctionnaires publics mentionnés dans les Articles précités du Code Pénal, en ce sens que les outrages commis sur sa personne sont de la compétence du Magistrat de District.

APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE,—PUBLIC FUNCTIONARY,—OUTRAGE, —C. PENAL ARTS. 156.158.160.—ORD. No. 35 OF 1852, SEC. 102.

The Treasurer of the Municipality does not fence within the classes of public functionaries, outrages on whom cannot be tried before the District Magistrate.

Number of Record : 155

LETORD, Appellant.
Versus.
THE QUEEN, Respondent.

Before :
His Honor the CHIEF JUDGE.

E. BAZIRE,—of Counsel for Appellant.
C. LABORDE,—Appellant's Attorney.
S. J. DOUGLAS,—of Counsel for Respondent.
J. BOUCHET,—Respondent's Attorney.

18*th September* 1862.

The Appellant had been tried before the Junior District Magistrate of Port Louis, for an assault upon Julien Doger Spéville, Treasurer of the Town. The Appellant was a clerk in the Municipality.

On Appeal, the sole question argued was the Jurisdiction of the Magistrate below to try questions of assault on public functionnaries, and Articles 156,158 and 160 of the Penal Code of the Colony were referred to. A similar point was argued before this Court, in the case of *Malépa versus the Queen,* (Reported by A. PISTON, VOL 1 Page 131.) And the Judgment was against the Appellant. A person, in the position of the party said to have been assaulted here, is not within the classes of public Officers, outrages, and violence on whom are not cognisable before the District Magistrate.

The Appeal must, therefore, stand dismissed, with costs.

Bail Court.

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT.—COPIE DE RECORD.

Circonstances en vertu desquelles la Cour n'a pas cru devoir mitiger la peine infligée à l'Appelant par le Magistrat de District.

Les copies de Record envoyées à la Cour Suprême doivent être d'une scrupuleuse exactitude.

APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE.—COPIES OF PROCEEDINGS.

Circumstances in which the Court saw no reason to mitigate the punishment by the District Magistrate for assault.

The copies of the proceedings sent up to the Supreme Court ought to be scrupulously accurate.

Number of Record. 158

SAPERMUL & ORS., Appellants.
versus
THE QUEEN, Respondent.

Before :
His Honor the CHIEF JUDGE,

LS. ROUILLARD,—of Counsel for Appellants.
C. LABORDE,—Appellants' Attorney.
G. B. COLIN,— of Counsel for Respondent.
J. BOUCHET,—Respondent's Attorney.

18*th September* 1862.

This was an Appeal from a Sentence of the District Magistrate of Grand Port, sitting on the Criminal side. The Magistrate had convicted the Appellants of assault, and sentenced them to three months, imprisonment with labour.

Under the Appeal, the only point pressed upon the consideration of the Court, was the propriety of mitigating the punishment, which was alleged to be too severe, in the circumstances.

After a careful perusal of the documents and evidence, it did not appear to this Court that there is any reason for interfering with the Sentence.

The Court observed that, in the copy of the proceedings sent up, the dates of the Medical certificate, attesting the nature and extent of the injuries, received by some of the parties assaulted, were not given. In this matter there was plainly a neglect, in some quarter or other, which ought not to have occurred.

Appeal dismissed, with costs.

Supreme Court.

VENTE D'IMMEUBLE,—VENTES SUCCESSIVES A PLUSIEURS ACQUEREURS PAR LE MÊME VENDEUR.

Lorsqu'un immeuble a été vendu, par le même propriétaire, à deux acquereurs successifs, le second acquéreur n'a pas de recours à exercer contre le premier par suite de la différence qui peut exister entre les deux prix de vente.

SALE OF IMMOVEABLE PROPERTY,—SUCCESSIVE SALES, TO SEVERAL PURCHASERS, BY THE SAME VENDOR.

When an immoveable property has been sold, by the same owner, to two successive purchasers, the last purchaser has no claim to exercise against the first purchaser on account of any difference between the two prices of Sale.

Number of Record. 7858

CHAUVOT,—Plaintiff.
Versus.
ESNOUF & ORS.—Defendants.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2d. P. J.

H. CHAUVOT,—of Counsel for himself.
V. LAVAL,—Plaintiff's Attorney.
J. L. COLIN,—of Counsel for Defendants.
J. PIGNÉGUY,—Defendants' Attorney.

30th September 1862.

The Declaration, in this case, concludes with the following prayer: "That the Defendants be condemned to pay, in solido, to the Plaintiff, the sum of $1020. 36 ¢, together with interest thereon from the 28th January 1841, with costs." On the following grounds: 1st.— Because, by an act, dated the 28th day of January 1841, drawn up by Mr. Notary Jollivet, the said Plaintiff did pay, to certain heirs Pagand, the sum of $ 7062, 09 ¢, for the sale price of the 7/8ths of the Estate Pagand, situate in the District of Rivière Du Rempart, at the place called Poudre d'Or, the said Estate then being the property of Aviragnet jeune, Aviragnet aîné the wife, and Widow Chupein, by an Act under private signatures, dated the 10th day of September in the year 1838, according to which act, the last instalment was to be paid on the 30 th day of January 1841.

2dly.— Because the Plaintiff, by an act passed before Mr. Notary Jollivet, on the eighth day of January in the year 1841, did pay the debt of the said Aviragnet Junior, Aviragnet the wife, and the Widow Chupein, and that having received from the purchasers the sum of $ 4000, in order to pay the vendors, he, the said Plaintiff, had to pay, to 7 of the heirs Pagand, the sum of $ 7,061. 09 ¢, which sum the said Aviragnet jeune, Aviragnet aîné the wife and Widow Chupein must naturally settle with the said Plaintiff, for the difference, each for one third, that is to say: $1020. 36 for each of the three purchasers; the said Widow Chupein having died in the year 1839 and being represented by Amand Eugène Esnouf the wife, one of the said Defendants, her daughter, and by two grandsons, Charles Aviragnet and Eugène Aviragnet, the said Defendants.

The whole Declaration has been traversed by the Defendants.

The cause came on for trial, on 7th August when parties last were heard.

JUDGMENT.

It would be a mere waste of time here to recapitulate the arguments urged by the Plaintiff in support of the allegations contained in his Declaration.

Suffice it to say that he bases his claim upon an instrument of sale, drawn up by Notary Jollivet, dated the 8th January 1841, which, on reference, discloses a sale, from the Pagand, not to the Plaintiff and Defendants, but to the Plaintiff alone, from whom the vendors acknowledge having, on the day and year aforesaid, received the sum of $7061.09 c.

True it is that, from a previous instrument, under private signatures, of the 10th September 1838, duly registered, it might be inferred that the Estate Pagand had once vested in the Defendants.

But if so, how are we to account for the sale direct to Chauvot, of that Estate, by the Heirs Pagand, which, as alleged, had vested in the Defendants ever since 10th September 1838, unless it be assumed that the sale referred to, in the instrument of the 10th September 1838, was never carried out.

Moreover it is evident that, if the sum demanded by the Plaintiff be paid by the Defendants' these of course must have a share in the Estate, or in the sale price of the Estate, sold by Plaintiff to Jamin and Hardy. And yet we find no offer, on the part of the Plaintiff, to reconvey such share to them, or to assign to them any portion of the sale price.

Hence, it necessarily follows that the Plaintiff, having failed in proving the several allegations of his Declaration, his action must be and is accordingly dismissed, with costs.

Supreme Court.

MANDATAIRE,— RÉCLAMATIONS FAITES ET ACTES PASSÉS PAR CE DERNIER,—NOTIFICATION DE TRANSPORT,—C. CIV ART. 1690.

Un transport, fait en faveur du Mandataire, personnellement, ne peut servir de base à une action intentée par ce dernier au nom de son mandant.

AGENT,—DEEDS SIGNED AND ACTIONS ENTERED BY THE LATTER,—INTIMATION OF AN ASSIGNMENT.—C. C. ART. 1690.

An assignment in favor of A personally, cannot support a suit, at the instance of B. & C, where A appears as their attorney.

Number of Record: 8406.

CHAUVOT & WIFE.—Plaintiffs.
Versus.
WIDOW JAMIN & ORS.—Defendants.
Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2 P. J.

H. CHAUVOT,—of Counsel for Plaintiffs.
V. LAVAL.—Plaintiffs' attorney.

E. Leclézio,—
G. B. Colin,—
J. L. Colin,— } of Counsel for Defendants
E. Leclézio,—
E. Boulaé,— } Defendants' Attornies.
F. Robert,—

17th October 1862.

In this case, the Plaintiffs Pierre Chauvot and Josephine Legoff, the wife duly authorized of Pierre Chauvot, and the latter for the validity of the procedure, both absent from Mauritius, and therein represented by Henri Chauvot, of Government street, Port-Louis, Advocate, set forth that, by an act under private signatures, dated 24th June 1840, made and passed between Plaintiffs and Pierre Aviragnet Junior, Pierre Aviragnet Senior, and Louise Chauvot, his wife, and Eugène Esnouf and Marie Joséphine Ernestine Chupein, his wife, on one part; and Adolphe Jamin, now deceased, and whose succession and community are now represented by the Defendants on the other part; the said late Adolphe Jamin did purchase, from the said Plaintiffs, and the other parties above named, a sugar Estate situate in the District of Rivière du Rempart, at the place called "Poudre d'Or," measuring 723 acres, or thereabouts, and more fully described in the said private act, for the principal sum of $ 160,000, payable at the several dates mentioned in the said private act.

Whereas the said Adolphe Jamin, being indebted, to the Registration Office of this Colony, in the sum of £782.10s. for the Registration fees on the said private act, has not paid the same to the Receiver of the Registration dues of this Colony, and that Henri Chauvot, as proxy of the said Plaintiffs in this Colony, has been bound to pay the same to the said Receiver of Registration dues, on the first day of May instant month, when the said Receiver of Registration dues subrogated him in all his rights, and that, therefore, the Plaintiffs are entitled to claim payment of the said sum, from the said Defendants, with interest thereon from the said first day of May instant.

The Defendants met the demand by a variety of pleas, among others by these, namely: 1o. That they had never received any "*signification*" or intimation of the "*transport*" which the law imperatively requires. (C. C. Article 1690.) "Le cessionnaire n'est saisi à "l'égard des tiers que par la signification du "transport, faite au débiteur. Néanmoins le "cessionnaire peut être également saisi par "l'acceptation du transport faite par le débiteur, dans un acte authentique."

(2o.) That the alleged *transport* was altogether informal and ineffectual as it bore date after the suit was raised, so and the Plaintiffs were without title at the date of the Declaration.

(3o.) It could not support the present suit, in respect it bore to be made to Henry Chauvot, in his private name, and not to the Plaintiffs.

The Court said: It does not appear to us to be necessary to go beyond the last plea stated. The "*Transport*" here has been gone about, apparently, in a very hasty and, certainly, in a very careless way. A cession to A. B. as individual, can never support a Declaration by C. D. and E. F. in which A. B. appears merely as the representative of these other parties, in their absence.

The Plaintiffs, not having elected to be nonsuited, the action will stand dismissed, with costs.

Supreme Court.

Mandant et Mandataire, — Action en rectification de comptes.

Agent and proxy,—Action in rectification of accounts.

Number of Record: 7857.

CHAUVOT AND WIFE,—Plaintiffs.
Versus.
ESNOUF,—Defendant.

Before:

His Honor the Chief Judge and
The Honorable N. G. Bestel 2 P. J.

H. Chauvot,—of Counsel for Plaintiffs.
V. Laval,—Plaintiffs' Attorney.
J. L. Colin,—of Counsel for Defendant.
J. Pignéguy,—Defendant's Attorney.

30th September 1862.

On the 1st March 1841, the Plaintiffs Pierre Chauvot and wife left this Island, after having executed, on the 27th February of the same year, a power of attorney, both general and special, to J. B. H. Sérendat and A. Eugène Esnouf jointly and severally.

To this power were annexed certain instructions for the better information and guidance of the attornies in the discharge of the duty cast upon them by their principals.

On and from the day of the Plaintiffs' departure for Europe, that is on and from the 6th last day of March 1841, the attornies entered upon their duties as the holders of the Powers of Plaintiffs.

These duties they continued to discharge up to the day when, on the express demand of Sérendat and Esnouf, the power entrusted to them by the Plaintiffs was revoked by the latter and given to one Pierre Aviragnet, by a notarial instrument, dated at Bordeaux the 29th September 1843.

On the arrival here of the then appointed attorney, Pierre Aviragnet, the latter, in pursuance of the powers vested in him by his principals Pierre Chauvot and wife, demanded of Sérendat and Esnouf an account of their administration of the affairs of the said Pierre Chauvot and wife under their power of the 27th February 1841.

The account rendered by them, satisfying the new attorney Pierre Aviragnet, the latter, as such attorney of P. Chauvot and wife, by a notarial instrument dated the 20th May 1844, before Notary Jollivet and his colleague, released and discharged Sérendat and Esnouf: " de toutes choses généralement quelconques " relativement à ce mandat, sans aucune réserve. "

This release was never criticised by the Plaintiffs, as far at least as Esnouf was concerned, up to the time of their son's arrival here, bearer of a new general and special power of attorney from the Plaintiffs.

This power, from Mr. and Mrs. Chauvot to their son Mr. Advocate Henri Chauvot, of the 11th July 1860, specially authorizes the latter to: " Faire aussi tout réglement de compte. " 1o. soit avec Mr. Eugène Esnouf manda- " taire de Mr. et Mme. Chauvot aux termes " de pouvoirs à lui conférés en 1841."

It is in the exercise of this power that Mr. Advocate Chauvot has brought the present action.

Feeling, however, the difficulty of calling upon Esnouf for a settlement of accounts, 1o. by reason of the release of Plaintiffs by their attorney Pierre Aviragnet; 2o by reason of the time which had been allowed to elapse since the account rendered by Esnouf to Aviragnet, and since the release just mentioned, the Plaintiffs, by their now attorney H. Chauvot, have not hesitated to charge both Esnouf and Aviragnet with fraud, with the view of obtaining a revision of the long closed accounts between Esnouf and Plaintiffs. Esnouf is charged with having rendered to Aviragnet a false account, well knowing the same to be false, and Aviragnet with having allowed such false account, well knowing the same to be false, and for having nevertheless, released Esnouf.

Esnouf and Aviragnet are both nephews of the Plaintiff Chauvot Senior, they are also brothers in law. This latter fact, and certain alleged errors in the account given in by Esnouf and allowed by Aviragnet, are the grounds alleged in support of the fraud charged and of the rectifications demanded by Plaintiffs.

But of such fraud, we hasten to say, no evidence has been adduced. The errors alleged to exist in Esnouf's accounts are also unproved as will appear hereafter. But let us see the case of the Plaintiffs as set forth by themselves. They alleged as follows :

" Whereas on their, the Plaintiffs' leaving the colony, in the year of our Lord one thousand eight hundred and forty one, they, the said Plaintiffs', did give their power of attorney and instructions to the said Defendant, the said power of attorney dated 7th February 1841.

After a few years, management, the said Defendant was revoked and presented his account to one Pierre Aviragnet jeune, his brother in law, who had been in France the person in charge of the said Plaintiffs' affairs, and after having received the account of the said Defendant, at Mauritius, and given him discharge, continued, on his return to Bordeaux, to manage the affairs of the said Plaintiffs until the year 1858, keeping with him all the papers, titles and documents which should have enlightened the said Plaintiffs on their real situation, and so deprived them, the said Plaintiffs, from the exercise of their rights against his brother-in law and partner, which facts are established by judicial acts the most positive.

Whereas, in comparing the account of management of the Defendant with the said documents, numerous errors, omissions and items irregularly charged are seen.

1o. In the debit side, the proxy Esnouf carries twenty one items, amounting altogether to four thousand five hundred and sixty dollars and forty eight cents, as regards one Mrs. Hubert Bernard, born Aglaé Pagand, who according to the sale made on the 10th September 1838 of the Estate Pagand, was creditor of one Pierre Aviragnet jeune, Mrs. Pierre Aviragnet ainé and widow Chupein, purchasers each of one third of the said Estate Pagand.

In the rights and obligations of the said widow Chupein was, in 1841, Esnouf the wife her daughter; the Plaintiffs having never been personally indebted for whatsoever to Mrs. Hubert Bernard.

2o. In the same side, and under date the 10th and 16th July 1841, Esnouf carries two items, amounting to one hundred and twenty five dollars and ten cents, as regards the costs paid to Mr. Notary Jollivet, which sum had been settled by the Plaintiffs before their departure from Mauritius, on the 27th February 1841, as it results from a bill of costs

acquitfanced by Esnouf himself then first clerk of Jollivet.

The said sum is to be claimed to-day from the Defendant personally, for the Book of Mr. Notary Jollivet, deposited at the Registry of the Supreme Court, shews that he has been paid but once.

3o. In the instructions of Chauvot, produced by Esnouf himself, the following words are read: "La moitié de l'immeuble donnant sur "la Chaussée est louée à MM. Parcou et Co. "à raison de $70 par mois..... Les loyers "sont dus depuis le 5 Janvier dernier."

In the account of management, the rents paid by Parcou begin but from the fifth day of February; wherefore Esnouf has not carried on account the rents of January, $70.

4o. In the debit side Esnouf carries $1676, 04 ¢, for costs of licitation of the Estate Chauvot, to wit:

On 15th April 1841.....	$ 250
On 7th March 1842.....	310
Do. do. do. do	325
Do. do. do, do	665.40
On 2nd May 1842.....	125 64

Which licitation was caused by the absence of two heirs, and for that reason the costs were at the charge of all the co heirs among whom Mde. Esnouf was; all the heirs present at Mauritius having sold the patrimonial Estate to one of them, were fully bound to support with him the costs of licitation, and could be dispensed, but by an express condition, which is written no where; nay more, in a notarial deed of the 1st March 1841, drawn up by Trebuchet, whereby the four co-heirs of Pierre Chauvot received payment, they subrogated the said Plaintiffs in the rights, *avec toute garantie*, among which guarantees is, in the first rank, that claimed to day, namely: to give a regular title to the purchasers; consequently one fifth only of these costs was to be put on the account of Chauvot, viz: $ 335 20 instead of $1676,04; difference $1340,84.

5o. In the same side, and under date the 25th day of July 1843, Esnouf has written: "Payé pour traites prises des héritiers Harel, "expédiées à M. Chauvot, $ 17,351,71 ¢."

The note produced by the Defendant shews that these drafts have been negociated at nine per cent premium. They have been taken with the money paid for the first instalment of $ 25,000, by Messrs. Jamin and Hardy, the purchasers of the Estate Chauvot.

According to an act of sale, the first instalment was to be paid on the 1st July 1842, at this date the purchasers were not compelled to pay because the vendors were not *en règle*, relative to the Estate Pagand, which concerned the said Defendant and not at all the Plaintiffs.

In July 1842, two private bills were negociated in Mauritius at 4 or 5 o|o premium, consequently it is mere justice that the proxy be held as responsible towards his constituants for the prejudice caused by his own fault, and in his own interest, that is to say the difference between the premium of 1842 and the premium of 1843, namely $795.95 cents.

In the same side and at the same date, the proxy carries: "Payé pour traite de M. Jollivet envoyée à M. Chauvot, $ 1430." The correspondence shews that this private bill has been negociated at ten per cent premium. It has been taken with the money paid by Jamin and Hardy in 1843, instead of in 1842, for the reason above mentioned; consequently it is fair to withdraw from the account the difference between the rate of 4 per o|o and 10 per o|o premium, that is to say on Jollivet's bill, $ 78.

7o. Under date the 25th November 1843 it is written: "Payé à M. Gallet pour traites "envoyées à M. Chauvot $ 6540."

The correspondence informs Chauvot that those drafts have been negociated at nine per cent premium, but Esnouf does not produce any bordereau, any note of the sworn broker who negociated the drafts. We on the contrary produce an extract of the Mauritius Price Current shewing that in November 1843, private bills (and Chauvot has received but private bills) were negociated at par.

If no justifying note is produced by Esnouf, it will be good justice to withdraw nine per cent from that item, say $588, and 66 c.

8o. Under date the 12th September 1841, is mentioned a bill of costs of Mr. Notary Trebuchet, amounting to $ 244 and 80 c. In the justifying document communicated by Esnouf himself, are seen deeds partly due by the said Esnouf and his co-heirs Messrs. Aviragnet: 1o. An act of notariety bearing date 1st. March 1841. 2o. An extract of inventory of Mrs, Chupein, the mother in law of the said Esnouf and Aviragnet, relative to the two acts; $ 30.42 ¢ are to be withdrawn.

9o. On the 30th August 1841, the proxy carries: "Payé à M. Barry, notaire, pour un extrait du contrat de mariage de Monsieur Leborgne demandé par M. Trébuchet pour la vente à M. Jamin, $ 2." The information is erroneous, the above mentioned extract has been used to shew the rights of one Leborgne to the succession of his wife's brother; and the said Leborgne had, at that time, at Mauritius, for his proxy, Mr. Aviragnet, on whose account the item was to be brought.

10th. Under date the 10th July 1841, is this item : " Payé pour une sommation faite " à MM. Kader frères pour obtenir le paie- " ment des loyers échu $3.32 centièmes ;" the notice has been made, not for Chauvot but for Mr. Aviragnet, as shewn by the registration thereof, Vol. 55, No. 339 : " Signification d'un " compte de $ 500, avec assignation aux " sieurs F. & H. Kader frères à l'audience du " 12 courant, requête du sieur Aviragnet aîné " enregistré le vendredi 2 juillet 1841."

The account of the said Aviragnet aîné, will be produced, wherein no cost is mentioned.

11th. Mr. Aviragnet who discharged Esnouf has written, in a note, that the said Esnouf received, on the 5th day of April 1842, from one Cangy the sum of $100 and from the same Cangy, on the 31th day of December next $50. The account of Esnouf has omitted those two sums, viz : $150.

12th.—When Pierre Chauvot left this Colony he delivered to Esnouf certain promissory notes subscribed by Mr. and Mrs. Duffau, amounting to $ 4531.14 c. with order to reduce the said claim to $ 4000, to the profit of the debtors, and to insure the same by a mortgage in favor of two daughters of Duffau.

This claim is not mentioned in the account of management ; the correspondence does not say one single word about it, and Esnouf does not produce the promissory notes.

The Plaintiff is entitled to ask that the use of the promissory notes be proved, and in default of his so doing the said proxy be condemned to reimburse the amount of the said promissory notes.

13 th.— The sums above mentioned, upon which the proxy has taken a commission of 2 ½ p. o|o, amount to $ 7,594,23 ¢. The commission having been unduly taken, on those sums, is to be withdrawn, viz : $ 190,85 ¢.

By the fact of the Defendant, and especially by the intervention of an authentic act, dated the 29th of August in the year one thousand eight hundred and fifty nine, signed by Amand Eugène Esnouf and Dumat, both as Notaries public, which act is at the least erroneous, the Plaintiffs have been obliged to send their agent to Mauritius, for the purpose of settling with the said Defendant.

Whereas such a voyage is always made with large expenses of money.

Whereas the said Agent, when in Mauritius, has been obliged to sue the heirs Joillivet before arriving to Esnouf ;

Whereas the notary public is, according to law, responsible for the prejudice he has caused, even by mere error or neglect.

The sum of ten thousand dollars is claimed as damages.

Whereby, and in consequence of all that is above stated, an action has accrued to the Plaintiffs to have and demand, of the Court here, to condemn the said defendant to pay to them :

1o. The sum of $ 12,466.22, c. amount, in pricipal, of the sums above mentioned, with interest thereon, at nine per centum per annum, from the respective dates on which the said sums were unduly employed by the said Defendant.

2o. The sum of ten thousand dollars, as damages, with costs."

This Declaration was met by the ordinary Plea of Plaintiffs, having no right, &a., to sue the Defendant, by reason of the facts, matters and things in the Declaration set forth, which moreover are all specially traversed and denied by the Defendant.

But next is pleaded the release, by Aviragnet to Esnouf ; and last, that the Defendant is " not indebted ", in manner and form as in the said Declaration mentioned, &a.

In dealing with the several heads of the Declaration, we propose, for the sake of greater clearness, to take them in the order in which they were successively brought forward by the learned gentleman who has been allowed to address the Court on behalf of Plaintiffs. And we must add that our attention will be directed and confined to those heads only upon which the Plaintiffs have chosen to address us, the silence of the Plaintiffs, on the other heads, clearly shewing the little importance attached by them to those averments.

First head.—*Costs of licitation* of the Estate sold by Chauvot and wife to Jamin and Hardy, with which it is alleged that Chauvot and wife have been unduly debited by the Defendant.

By an instrument, dated the first March 1841, before Mr. Notory Trebuchet and his colleague, Chauvot and wife sold to Jamin and Hardy, a Sugar Estate situate at a place called Poudre d'Or, in the District of Rivière du Rempart, for the sum of $ 60,000, payable in three several instalments of $20,000 each, on 1st july of each of the years 1842, 1843, & 1844, with interest at 6 per centum per annum.

But, owing to the absence, from the Island, of two of their co-heirs, whose existence was still doubtful at the date of their sale to Jamin and Hardy, the Plaintiffs were not the sole proprietors of the Estate. It is therefore provided, in the deed of sale, as follows : "Mais

" attendu le vice résultant de l'absence; au " dit partage, (That is the partition of the Estate of Mr. and Mrs. Joseph Chauvot the father and mother of Chauvot, one of the Plaintiffs in this cause) " des sieurs Barthéle- " my Michel Chauvot and Jean Baptiste Jos. " Chauvot, M. Pierre Chauvot, vendeur, s'o- " blige, afin d'assurer, au profit de MM. " Jamin & Hardy, la transmission régulière de " la propriété des dits biens, d'en poursuivre, " *à ses frais* et dans le *plus bref délai possible*, " contre les dits absents, la licitation, dans les " formes prescrites par la loi; et MM. Jamin " et Hardy s'en rendront adjudicataires, pour " la portion qui reviendra aux dits absents, " par l'effet de la dite licitation, avec tous les " intérêts y attachés, être payés par MM. " Jamin et Hardy, à qui il appartiendra, en " déduction du dernier terme de leur prix ci " après fixé."

In his instructions to his attornies, of the 26th February 1841, reference is again made, by Chauvot, one of the Plaintiffs, to this licitation, in the following words: " Par le " contrat de la vente que j'ai faite à MM. " Jamin & Hardy, j'ai pris l'obligation, afin " de leur fournir des titres réguliers, pour " plusieurs terrains compris en cette vente, 1o. " de faire liciter *à mes frais* le terrain me pro- " venant des successions de mes père et mère; " M. Esnouf, avocat est chargé de cette " affaire; il importe de ne pas la négliger."

As an evidence of the importance which the vendors, and now Plaintiffs, Chauvot, attached to perfecting " à ses frais et dans " le plus bref délai possible" Jamin and Hardy's title, we find, in the first place, this matter stated, in his instructions, to be important and not to be neglected; in the second place, we collect from the *Cahier des Charges* of the judicial sale of the Estate, that the preliminary steps for the sale by licitation, agreed upon between parties, were taken by Jamin and Hardy sometime before the departure of Chauvot from this Island. Chauvot left the Colony on the 1st March 1841, and the Memorandum of the Appraisers of the Estate sold is dated the 12th day of January 1841.

These dates clearly shew, was it said by the Defendant, that the demand in licitation had been introduced, by Jamin and Hardy against Chauvot, during the latter's presence in the Island. Had the demand been wrongfully entered, Chauvot, being on the spot, might and would assuredly have objected to it. But first, no objection whatever has been taken by Chauvot, secondly, he appears as a party to the proceedings on his leaving the Island; his attorney merely followed up what had been begun by or in presence of his principal. His warrant, for pressing matters on was the instructions of his principal especially requiring that this affair should not be neglected.

The allegations of Plaintiffs, in the first head of the Declaration, being altogether unsubstantiated by the evidence tendered, it necessarily follows that the Plaintiffs have been duly debited, and that this part of the demand must be, and is accordingly, dismissed.

The *second* head of the demand is the affair Bernard, so styled by the Plaintiffs' agent.

The Estate, sold by Plaintiffs to Jamin and Hardy, was made up of several portions of land, which had come to them by descent and purchase, at various times. For the sake of greater clearness, those several portions of land are divided into 2 Estates: "Plaisance" and "Pagand."—All that has been said above refers to the Estate "Plaisance," and the affair Bernard is connected with the Estate "Pagand."

The Estate *Pagand* is alleged to have been originally purchased by Aviragnet and Mrs. Chupein, from the heirs Pagand, of whom Mrs. Bernard was one.

But it would appear that, with the leave and consent of the purchasers, that Estate was subsequently dealt with, by Chauvot, as being his property, and conveyed by him to Jamin and Hardy, for the sum of $ 40,000, by the one and same instrument which conveyed to them the Estate "Plaisance," the property of Chauvot above mentioned, for the sum of $ 60,000.

The $ 40,000, are said to have been employed, by Aviragnet and Mrs. Chupein, in paying off their purchase price of the Estate Pagand, to the several heirs Pagand, with the exception however of Mrs. Bernard who, by reason of her suit in divorce against her husband, was legally prevented from then signing a valid release for her share, in the $ 40,000, (viz:) $ 4063, 53 ¢.

This sum was therefore deposited, it has been said, with Notary Jollivet, to abide the fate of the judgment on the Divorce question, between Bernard the wife and her husband; but subsequently withdrawn, with the consent of Aviragnet, by Chauvot, on the understanding, between them, that Mrs. Bernard should be paid the interest of the sum so deposited by Aviragnet, and withdrawn by Chauvot.

Interest were accordingly paid by Chauvot's agent (Esnouf) to Mrs Bernard and carried to the debit of Plaintiffs.

However the existence of such deposit and withdrawal have been denied by the present attorney of Plaintiffs.

The evidence before the Court, on this head, is this:

We have, in the first place, a judgment,

made between Mrs Bernard and her husband, of the 18th October 1841, thus worded :— " Autorisons, en conséquence, le Sieur Chau- " vot, et tous autres à ses droits, à payer à la " demanderesse (Mrs Bernard,) sur les inté- " rêts échus ou à échoir de la créance dont ils " sont débiteurs envers les époux Bernard, " une somme de trente piastres par mois, à " compter du 1er du courant. "

In the second place, a letter from Plaintiff Chauvot, dated at Bordeaux, the 15th February 1841, to Esnouf, with these words :

" Vous ne me parlez même pas de la lici- " tation de l'habitation qui n'était pas ache- " vée lors de mon départ. Voilà des choses, " il me semble, que vous auriez pu me faire " savoir." (Chauvot proceeds as follows :) " Je vous vois dire : ce Chauvot est toujours à " se plaindre. Il est bien vrai cependant que " je suis parti de Maurice après avoir touché " $ 64,000, compris les $ 4000 qui devaient " être remises aux Pagand."

In the third place : On the judgment decreeing the divorce between parties, Mrs. Bernard, recovering the full exercise of her legal rights, on the 22nd November 1842, sold and conveyed to Chauvot, represented by Esnouf, her portion in the Estate, for the sum of $ 4062, 53 ¢, which she acknowledges, in the deed of sale, to have received from Esnouf, as such Attorney of Chauvot.

All these facts were known to Chauvot. The interest paid to Mrs. Bernard, for the use of her money, has been included in the account rendered by Esnouf.

The fact of Chauvot having withdrawn the amount of the share accruing to Mrs. Bernard, treated as an impossibility, is proved to be " a possibility," by the acknowledgement of Chauvot, of his having taken with him, to France, $ 64,000, including the $ 4000 due to the Pagand, and by the payment, by Chauvot, of Mrs. Bernard's share in the sale of the Pagand's Estate to him, in the person of his representative Esnouf.

The force of the admission, by Chauvot, in his letter to Esnouf, has been so strongly felt by his present Attorney, that the latter has been reduced to the sad necessity of warning the Court from attaching more importance, than it deserved, to the admission of so simple a minded man, and unsuspecting a creature as his father, plied especially, as he was, by two such subtle men as Aviragnet, in Europe, and Esnouf, in Mauritius.

We are not, and cannot be, expected to inquire into the character, merits or demerits of Aviragnet, who is no party to this suit ; but if we are to judge of his conduct, by that of Esnouf, we might, as to him, arrive at the same conclusion we have reached, with regard to Esnouf, on this second head of the demand, (Viz :) that it is altogether unsupported by the evidence adduced in support thereof, and must share the same fate as the Count which refer to the Costs of licitation, that is that it must be dismissed.

Trebuchet's Bill of Cost.

That any admission, on the part of Chauvot the Plaintiff, is deserving of full credit, at the hands of the Court, is rendered still more apparent, from the following extract from his letter to Esnouf, dated Bordeaux, 7th April 1842, having reference to notary Trebuchet's Bill of Cost, as to which Chauvot writes : " Vous avez bien raison de trouver exorbitan- " te la somme demandée par Trébuchet. Il " faut croire qu'il est fou, je pense bien qu'il " la réduira de beaucoup ; car je ne vois pas " ce qu'il a fait. C'est tout au plus si j'avais " été l'acheteur. Je vois encore que nous avons " reculé pour mieux sauter. Il aurait bien " mieux valu faire enregistrer le Sousseing- " privé que nous avons. Il m'en coute de n'a- " voir pas suivi ma première idée."

The anticipated and expected reduction of Trebuchet's Bill has been effected, through the agency of Esnouf, and brought to the low figure of $ 209, instead of $ 669, 64 ¢ originally claimed by Trebuchet, and yet here is Chauvot's son, and Attorney, alleging this Bill of costs as one of his grievances against Esnouf.

The reduction above mentioned is sufficient, of itself, to rebut such an assertion. On this point, the Judgment of the Court must be and is in favor of Esnouf.

Another Bill of Costs, paid by Esnouf to Jollivet, has now been brought under challenge in this action. The allegation is that Jollivet's Bill has been paid twice by Esnouf, to Chauvot's great prejudice, Esnouf, well knowing, at the date of the second payment, that the bill had already been paid by Chauvot. Not a particle evidence having been adduced in support of so grave a charge, the Court dismisses from further consideration this part of Plaintiff's demand.

The affair Cangy does not require much notice on our part ; the name Cangy is not mentioned in the Declaration, and the sum alleged, therein mentioned and designated at the Bar, under the name of *"Créance Cangy,"* does not tally with the figure set forth in the Declaration. This part of the Plaintiff's case is not proved ; on this head, judgment is also given against Plaintiffs.

Affaire Duffau.

In Chauvot's instruction to his Attorney, mention is made of a claim of $ 4,581.14 ¢, Mr. and Mrs. Chauvot had against one Duffau,

which they reduced to the round sum of $ 4000, wishing this sum to be secured, for the minors Duffau, by a mortgage on the Estate "Bois Chéri," at Moka, or any other which might be purchased by their debtor Duffau.

This therefore is a gift to the Misses Duffau. That Chauvot has a right to enquire how far his benevolent intentions have been carried out, by Esnouf, and whether the money has been laid out to the benefit of the Misses Duffau, there can be no doubt; but that he, Chauvot, should be entitled to demand that, on default of Esnouf so accounting, the sum above mentioned should be refunded to him, Chauvot, is not so evident. Esnouf has accounted by saying he got no document whatever from the Plaintiffs in support of his alleged claims against Duffau; that he was an old man, without a shilling, and that the claim was for the benefit of Duffau's own children, who appear and say they have no claim against Esnouf. There is no evidence that they made any demand whatever against the Plaintiffs.

On this head, Judgment must also go for the Defendant.

As for the Court having reference to the reduction of the premium on the Bills of Exchange, taken up by Esnouf, we arrive at the same result.

The Plaintiffs' case here has altogether failed.

After what has been decided above, it is not necessary to say more of the demand for damages than that it cannot be sustained.

True it is that it has been asserted that the informal document which had been forwarded, by Esnouf, to Chauvot, and so very important to the interest of the Plaintiffs, in France, rendered it necessary that a special attorney should be sent out to Mauritius, to inspect the document so forwarded; that, on the arrival of the Plaintiffs' present attorney, the latter applied to Esnouf for the inspection, in person, of the above document, which personal inspection was refused him. That, on such refusal, recourse was had to the process of the Court, for compelling submission to the inspection demanded, to which end the Plaintiffs have been subjected to considerable law expenses, as well as outlay, for the maintainance of his attorney in this Island, from the time of his arrival to this day.

Esnouf, on his side, answered these assertions by the statement of his having forwarded a correct copy of the document above mentioned, as soon as he had discovered, or as soon as his attention had been directed to the informality complained of, the existence of which could have no influence whatever on Plaintiffs' interest, in the alleged arbitration, in France, between himself and Aviragnet, and more especially after the haste with which the amended correct copy had been dispatched.

Although the reasons, assigned by the Plaintiffs, are nevertheless insufficient to support this part of their demand for damages, alleged to have been sustained, yet it cannot fail to have some weight in the disposal of the costs in this action.

Had Esnouf been more careful in delivering, as a correct copy, that with he soon after discovered to have been but an informal and defective one; had he allowed, when applied, to the personal inspection of the original he had in by hand, he might have prevented at least a part of the subsequent litigation.

The silence of the Plaintiffs, on the other Counts of their Declaration, and the absence, therefore, of any defence on those several Counts, will relieve the Court from the necessity of dealing specially with them.

We would not have gone so deeply into the consideration of the other heads of the Declaration, had not the officer charged insisted on a thorough investigation in vindication of his character in which he has been quite successful.

On the whole, therefore, the demand is dismissed. Defendant to have his costs, as taxed by the Master, minus one fifth.

Supreme Court.

CALOMNIE,— DIFFAMATION, — ACTION EN DOMMAGES ET INTERÊTS.

LIBEL,—DEFAMATION,—ACTION IN DAMAGES.

Number of Record: 7416.

ESNOUF, Plaintiff.
Versus.
CHAUVOT, Defendant.
Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2nd P. J.

J. L. COLIN,—of Counsel for Plaintiff.
J. PIGNÉGUY,—Plaintiff's Attorney.
H. CHAUVOT,—of Counsel for Himself.
V. LAVAL,—Defendant's Attorney.

30*th September* 1862.

This was an action of damages, for libel and defamation, arising out of certain proceedings connected with the immediately preceding case of *Chauvot vs. Esnouf*.

The present Plaintiff (Esnouf,) set forth, in his Declaration, that the Defendant (Chauvot) had composed and published a certain false & scandalous libel, of and concerning the Plaintiff, printed at Mauritius, entitled : " Mémoire " pour M & Mme Chauvot contre M. Eugène " Esnouf, assigné en redressement d'erreurs de " compte." That, in the said libel, certain charges were advanced against the Defendant, of which the most serious were of the following import : " M. Esnouf, notaire, falsifie un acte " authentique,—un prétendu extrait-collationné,—invente un prétendu réglement entre " les héritiers Pagand." From which it was further alleged that there resulted : " de la " part de Me Esnouf, le faux le plus complet " que puisse commettre un notaire," that, in the conduct of the Defendant, there was both the *faux matériel* and the *faux intellectuel.*

In the second place, the Plaintiff charged the Defendant with composing and circulating, in Mauritius, another false and scandalous libel, printed in the neighbouring Colony of Reunion, and entitled :" Mémoire pour M. et " Mme. Chauvot contre M. Eugène Esnouf. " Redressement d'erreurs de compte," and containing, among other charges, the following statement : " Nous prétendons qu'il y a " eu, (in the Defendant's account,) erreur, " dol, fraude, c'est à nous à l'établir ;" that, *par surprise*, the Defendant had made Chauvot Senior pay the share of certain "*frais de licitation,*" which he should have paid himself, and had appropriated a certain number of acres of land, truly belonging to other persons, and had cheated the Defendant's father of a sum of money of $40\,62.53\,¢$.

In the third place, the Plaintiff averred that the Defendant had, in public places, and in presence of diverse persons, falsely and calumniously stated that the Defendant had been guilty of forgery, had swindled and plundered the Defendant's father, and had appropriated to himself property belonging to other persons.

The damages concluded for were £ 5000. The Defendant pleaded. 1o.— The ordinary denial of the Plaintiff's right, title and capacity to sue the action. 2o.—He alleged that the action was premature, as the case for rectification of accounts was not yet concluded. 3o.—He denied the use of the verbal slanders alleged, and, on the whole matter, pleaded that he had done nothing but what was necessary for the conduct of the action, at his instance, against the present Plaintiff.

From the evidence adduced, and the admissions made during the trial, it was clearly established that the first *mémoire* complained of was composed by the Defendant, and printed at Mauritius ; that the Defendant wished 60 or 65 copies to be thrown off, but that the printer refused to deliver the copies after they were printed, and 3 copies only got into the hands of the Plaintiff. The Defendant then applied to another printing establishment, in Mauritius, but the persons in charge, (although the Defendant offered to expunge any passages which might be considered objectionable,) also declined to print the " Mémoire." The printed copies, of which the Defendant got possesion, were shown by him to several of his friends, chiefly members of the Bar in Mauritius, and one of them was forwarded by him to the Procureur General, in support of a complaint which he had lodged against the Plaintiff, as guilty of breach of professional duty as a notary.

The second " Memoire," printed at Bourbon, was composed by the Deufant. Some sixty impressions were thrown off and 40 to 50 copies circulated by the Defendant in Mauritius. Copies were sent to the Judges of the Supreme Court, to the Plaintiff, to members of the legal profession, notaries and intimate friends of the Defendant, and it was in evidence that they were widely disseminated in the Colony.

With reference to the charge of verbal slander, one witness deposed that, in an open public auction room, the Defendant had stated to the witness that the Plaintiff had appropriated to himself 28 acres of land that did not belong to him.

The witnesses unanimously deposed that the Plaintiff is a gentleman of the highest character and reputation, that the statements against him were not believed by any one of them, and that their opinion of the Plaintiff was not, in the slighest degree, affected by the charges in question.

J. COLIN, for the Plaintiff, argued :

The proof of the slanders, both written and spoken, and of their publication, are complete. LEGRAVEREND. *Legis. Crim.* 3.558 Cass. 26 Mars 1813. DALLOZ. *Jurisprudence.* Verb. Outrage - C. P. 290. Roman law. *Cod. Lib.* 9. Tit. *de fam libel.* ; GODEFROY. *de Leg.* 5 *Section* 9 *D. de Inj. et fam. libell.*—STARKIE. *Evid.* Vol, 2. Page 620 and note D.—*Barron vs. Lewellyn.* Hob. 62.—BROOM's *Com.* 758 et 759.—CHASSAN, *Délits de la parole et de l'écriture.* Vol. 1. Page 44.—Cassation, PORTALIS. 15 Sept. 1837—Journal du Palais. 1838, 1. 282.—SIREY 39. 1. 977. PARANT, *Loi de la Presse.* Page. 71. —CHASSAN. Vol. 1. Page 34. GRATIER, *Loi de la Presse.* Vol. 1. Page 124,—SIREY. 44. 1. 511,—DEVILLENEUVE, in note, 1844. 1. 5 M.

The Plaintiff's statements, regarding my client, were utterly false and malicious, and he must have known this, being in possession of all the papers, so there was not even probable cause for what he said. (BROOM's *Com.* Page 749. HAIRE VERSUS WILSON. 9. B. & C. 645.—BROMAGE VS PROSSER. 4. B. & C. 257.—WRIGHT VS. WOODGATE. 2. C. M. and M. 573.—STARKIE, *Evidence.* 2. Page 630.)

Whatever may be the custom in France, the publication of such memoirs is unknown in Mauritius, and of this the Plaintiff could not plead ingorance, as when he consulted Mr. Antelme, a member of Council and an eminent lawyer, that gentleman told him: "that "although the practice existed in France, of "making "*mémoires*" before the hearing of a "cause, he considered that here, at Mauri- "tius, it was useless to do so, because every "thing was disclosed at the trial of the cases; "that Mr. Chauvot told him Channell (a "printer) had refused to publish his *mémoire*, "without his (Antelme's) opinion, and that "he had declined to give Channell his advice "to publish it."

But, in France, such *mémoires* are published by the law. (CHASSAN, *Délits de la parole.* Vol. 2. Page 545. *Duval c. Isnard* —4 Frimaire an. 11. (Le principe admis.) Journal du Palais. Vol. 1. Page 52. *Gault et Aché vs. Gassac,* 11 Mars 1812. déclarant la jurisprudence constante. Journal du Palais. Vol. 10 Page 200. *Poumeau vs. Routtier.* Journal du Palais. Vol. 26 Page 17. *Christophe vs. Roseleur.* Journal du Palais. Anno 1848. Vol 1. Page 171. *Dumarroy vs. Roparts.* Journal du Palais. (Cassation.) An. 1858. Vol. 1. Page 381.—*Deschamps vs. Joly.* Journal du Palais. Anno. 1855, 1. 82 *Colmont vs. Vincent* (Cassation.) Journal du Palais. Anno 1855. Vol 2 Page 390.—*Ballanger* (Bordeaux) 7 Août 1844. SIREY 45. 2. 552.) So the Defendant is without excuse. He has not even ventured to plead, in the record, the truth of the libels, though, if specially pleaded, the law of England might allow a proof of the *veritas convicii,* as affecting the real amount of injury done, and of the consequent reparation. But I do not found on any such mere technical objections. I have thrown every thing open to the Plaintiff, that nothing may remain covered or unexplained.

Pecuniary recompense I do not ask; the sole object of my client is the vindication of his character. Even if I had not proved special loss or damage, the law would award me, in a case like this, substantial compensation in money if I asked it.—*Steven's. Com.* 3.—445; BROOM's *Com.* Page 762; TAYLOR's *Evidence* 1. 175; *Smith vs. Thomas.* 2 Bing. 380. Note C. per Sindal C. J.—*Onslow vs. Horne.* 3 Wills 177. per de Grey C.J.—PERRY *on Lord Campbell's libel act.* Page 3.—Cour de Cassation. 3 août 1820. DALLOZ. *Jurisprudence du 19me siècle.* Verbo Outrage.

The Defendant pleaded his own cause, at great length, and went over again the same general grounds of argument, which he had submitted, in the former case of *Chauvot vs. Esnouf.* He maintained that his statements, advanced against the conduct of the Plaintiff, were true, or, at least, that he had reasonable and probable cause for believing them to be true. That, particularly as regards the *extract* certified by him, as made from the papers of the late notary Jollivet, the Defendant had violated the rules of his office ("*Dictionnaire "du Notariat. Papiers Domestiques,*" No 30.) He denied that the first printed memorial had been published, in the sense required by law, in a charge of libel, and submitted that the printing and publication of both memorials, so far as publicity was given to the contents, was consistent with the law and practice of France, and was necessary for the proper understanding of his case of rectification of accounts, and he contended that the charge of verbal defamation, as laid in the Declaration, had not been proved in evidence. He maintained that, by the word *Faux,* he intended *Falsehood* rather than a charge of *Forgery,* and relied upon the definition of the word, in DALLOZ, Vo. *Faux.*

JUDGMENT.

This action has arisen out of the case for rectification of accounts, at the instance of the present Defendant, against the present Plaintiff, in which Judgment has just been given. The present Defendant (Chauvot) is here charged with having committed certain acts, both of written and verbal defamation, against the Plaintiff (Esnouf.) The only defence, pleaded by the Defendant, on record, is that what he did was necessary for the maintainance of his position in the former case; but in his verbal defence, in open Court, looking at the Defendant's situation as a stranger, and personally conducting his own case, we have allowed him a latitude which could scarcely have been extended to a party in another position. It is due to the Plaintiff, to say, that he not only did not oppose the license conceded to the Defendant, but has given the latter every opportunity of maintaining whatever defence he might wish to state.

The Court has no difficulty in arriving at the conclusion that the Plaintiff has proved the whole of the very serious charges set forth in his Declaration. The charges, both written and spoken, are unquestionably of a highly defamatory and injurious character, and of their publication in the eye of law, there is no room for doubt.

Had the Defendant strictly confined the disclosure of his statements, to the parties connected with the former action, as his legal advisers, or had used them merely in his pleadings on the record, or in Court, and had given them no farther publicity by printing or otherwise, considering the wide latitude afforded, by Courts of Justice, to persons, in the conduct and management of their suits, the statements might have been held to be privileged. But, even in communications to one's Counsel or agent, or in his pleadings in Court, although the latitude conceded to a litigant is wide, it must not be allowed to degenerate into a license, to defame the opposite party, by

going into matters beyond the suit altogether. The law will not protect litigants who indulge in injurious statements neither relevant nor pertinent to the matters at issue.

But, in the present case, no question of this nature really arises, for the publication was widely made and to persons who had nothing to do with the litigation. Among these persons were gentlemen of high standing, in Mauritius, who advised the Defendant of the hazard of the course in which he was entering. Unfortunately he heeded not the wise advice that was given him, and the Defendant has given another instance of the danger of trusting entirely to one's own guidance and direction, in personal matters, where interest or feelings or both are deeply engaged.

The Defendant maintains that, in printing and circulating the "mémoires" in question, he only followed the course which is usually adopted in France. Even were this the case, the excuse could scarcely be admitted in Mauritius, where such a practice does not prevail. But it appears to us that the authorities which have been laid before us, from the law of France, do not support the Defendant's position. In that country, the custom, at one time, we believe, common in the other States of Europe, but long since abandoned in all parts of the British dominions, of sending printed memoirs to the Judges and parties connected with the case, before the hearing in Court, still prevails. But, as might be expected, in a country where law has been long reduced to a science, the authors of memoirs are not permitted, in France, to make them vehicles for slandering their opponents. Even when these statements have been submitted to the Judges alone, and read in Court, the Judges, where the party has gone beyond all reasonable latitude, may reserve, to the person injured, his right to enter an action for libel; and where the memoirs have been distributed, not only among the Judges, but published more widely, an action for libel will assuredly lie.

In such a case as the present, the law does not require actual proof of particular facts of pecuniary damage to entitle the Plaintiff to recover; and although the Plaintiff very properly refrains from asking pecuniary compensation, the Court, to vindicate the law, must award a certain sum of damages against the Defendant, which it fixes at £100.

The Judgment of the Court, therefore, is that the Plaintiff has entirely vindicated his character from the expressions cast upon it by the Defendant, and condemns the latter in payment of the above sum of £100, and costs of suit.

Court of Vice-Admiralty.

COMPÉTENCE,—3 & 4 VICT. C. 65 SEC. 6.—(1840).

Circonstances en vertu desquelles il a été décidé que la Cour d'Amirauté n'avait pas de compétence pour ordonner la saisie provisoire d'un Vapeur français mouillé en rade du Port Louis, pour le remboursement de fournitures et avances que l'on prétendait avoir faites au dit Vapeur.

JURISDICTION,—3 & 4. VICT. C. 65 SEC. 6 —(1840).

Circumstances in which it was found that the Court had no jurisdiction over a french Steamer lying in the harbour of Port Louis, to arrest her for supplies alleged to have been made to her.

BOULANGER, ROSTAND & TENNANT,
Promovents.

Versus.

FRENCH STEAM SHIP *MALARTIC*,
Impugnant.

Before:
The Worshipful C. FARQUHAR SHAND, Judge.

V. NAZ,—Of Counsel for Promovents.
V. De BAIZE,—Promovents' Proctor.
J. L. COLIN,—Of Counsel for Impugnant.
J. BOUCHET,—Impugnant's Proctor.

29th. September, 1862.

In this case, the process of the Court was asked, on the following affidavit, sworn by Aristide Boulanger, merchant in Port Louis, one of the members and liquidator of the Firm Boulanger, Rostand and Tennant, now in liquidation: "That there is justly and truly "due and owing to this said firm, now in li- "quidation, by the French Steamer "Malar- "tic," now at anchor in this Port of Port "Louis, the sum of nineteen thousand three "hundred and forty four dollars and thirty "six centièmes of a dollar, Mauritius Curren- "cy, for advances made, and supplies furn- "ished to the said Steamer, and wages and "disbursements paid to the crew and others, "whilst in this Port, and also to enable her "to proceed to sea.

"Further, that application has been made, "on behalf of the said Firm, to the owner of "the said French Steamer "Malartic," Antoine "Barthélémy Vidal fils de l'Ainé, of Toulon, "in France, merchant, through Jean Marie "Laffite, his duly constituted attorney in "Mauritius, for the payment of the aforesaid "sum of nineteen thousand three hundred "and fourty four Dollars and thirty six "centiemes of a dollar, Mauritius Currency, "but that the payment thereof cannot be "obtained."

The vessel having been arrested, the Impugnants objected to the jurisdiction of this Court. On 15th April last, upon the agreement and consent of parties, the Court ordered that the ship should be released, on security being given to answer the action. Unfortunately, this arrangement has not been carried out, and the ship still remains lying idle in the harbour of Port Louis.

The case has now been heard, on the question of the jurisdiction of this Court.

It will be remarked that the only ground of jurisdiction set up, by the Promovents, is the sixth Section, Act 3 & 4. Vict. C. 65. (1840.) It is in these terms:

"And be it enacted, that the High Court "of Admiralty shall have jurisdiction to "decide all claims and demands whatsoever, "in the nature of salvage, for services ren- "dered to or damages received by any ship, "or sea going vessel, or in the nature of "towage, or for necessaries supplied to any "foreign ship, or sea going vessel, and to "enforce the payment thereof, whether such "ship or vessel may have been within the "body of a country, or upon the High Seas, "at the time when the services were render- "ed, or damages received, or necessaries fur- "nished, in respect of which such claim is "made."

In argument, the learned Counsel for the Impugnant conceded that, by this clause, the same jurisdiction was bestowed on the Vice Admiralty Courts as on the High Court of Admiralty at home. Even were this the case (of which the Court is by no means satisfied,) looking at the words of the enactment and the object and intention of the legislature in passing such a law, the Statute would not, in the opinion of the Court, support the Promovents' case here.

In the suit of the *Ocean*, 17th April 1845, (W. Robinson's *Reports*. Vol. 2. Page 371.) the learned Judge of the High Court of Admiralty said:

"It remains that I should now consider "the clause with respect to *necessaries* sup- "plied to any foreign ship or sea going vessel. "These, I have already stated, are confined "exclusively to foreign vessels. And the "intention of the legislature in making the "provision, was to remedy great inconve- "niences which had formerly occurred, in "cases of foreign vessels, driven by stress of "weather, upon the coasts of this country. "In such cases, it often happened that the "Master had no credit, and great difficulties "were experienced in providing the requisite "repairs, and in obtaining a supply of neces- "saries, for the farther prosecution of the "voyage.

"With a view of encouraging the advance- "ment of these supplies, and thereby facilita- "ting the progress of vessels, so situated, to "their ports of destination, the jurisdiction "of this Court was enlarged, by the sixth "Section of the Act under consideration. But "to what extent? In my view of it, only to "the extent of embracing the cases of neces- "sity to which I have adverted."

It will be seen, at a glance, that their case, as stated by the Promovents themselves, is not covered by the words of the Statute, more particularly as the Act is explained by this authority.

But, farther, in the present case, enough has been disclosed to satisfy the Court that the parties, Promovents and Impugnant, do not stand in the position of ordinary alleged creditors and debtor.

They were in very close relations, as partners or joint adventurers in enterprises, in which this large vessel, the *Malartic*, was to have played a very conspicuous part. She stood registered as a French Ship, in the sole name of the late Impugnant, Mr. Vidal, of Toulon, while a share of her was sold, or attempted to be sold, to the Promovents, who have not paid the price.

The operations of parties, so far as they proceeded, were unfortunate. The questions, therefore, are truly questions of adjustment of accounts, which are not properly brought in a Court of Admiralty.

The suit must, therefore, be dismissed with Costs.

The *Malartic* to be released to the Impugnant, on payment of the usual costs and fees due to the Officers of the Court.

Supreme Court.

DEMANDE EN DIVORCE POUR CAUSE DE SÉVICES ET INJURES,—DEMANDE REJETÉE FAUTE DE PREUVES SUFFISANTES.

ACTION IN DIVORCE FOR SEVITIA AND INJURIES.—CASE DISMISSED FOR WANT OF PROOFS.

Number of Record. 7044.

RIGOLLÉ, the Wife, Plaintiff,
Versus.
RIGOLLÉ, the husband, Defendant.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2d. P. J.

J. L. COLIN,—of Counsel for Plaintiff.
C. LABORDE,—Plaintiff's Attorney.
G. B. COLIN,— of Counsel for Defendant.
J. GUIBERT,—Defendant's Attorney.

25th *September* 1862.

Vide Vol. I. Page 165.

This is a demand for a divorce *quoad foedus et vinculum*, prayed for by the Plaintiff, the wife of one Charles alias Charles Rigolle, for certain determinate causes set forth in the demand.

The demand was resisted by the husband.

The Plaintiff produced and examined her witnesses to prove the facts alleged against her husband, and the witnesses of the husband were next examined, after which the parties were heard by their respective Counsel.

The conclusions of the Ministère Public were opposed to the admission of the divorce prayed for.

The Court took time to consider.

JUDGMENT.

After carefully weighing the evidence adduced on both sides, the Court is clearly of opinion that the weight of the evidence is in favor the defence.

The spouses, it appears, are unhappy; whether it be from being unequally matched as to age, temper or from any other cause, is not our province to determine. But none of the *levitia*, nor any of the other facts alleged in support of the demand, against her husband, as far as they have been proved, are of such serious a character as to warrant the Court in setting aside the "Vinculum matrimonii" binding the parties.

The demand in divorce is therefore dismissed.

Each party to pay its own costs.

Bail Court.

VENTE DE MARCHANDISES,—VALEUR MORALE DES TÉMOIGNAGES, — CONSÉQUENCE DES ALLÉGATIONS FAITES PAR L'UNE DES PARTIES DANS UNE CAUSE PRÉCÉDENTE.

SALE OF GOODS,—CREDIBILITY OF WITNESSES,—EFFECT OF STATEMENTS MADE IN A FORMER SUIT, BY ONE OF THE PARTIES.

Number of Record. 8350.

HAJEE HASSEN AYOOB. Plaintiff.

versus

HEERASSING. Defendant.

Before:

His Honor the CHIEF JUDGE.

J. ROUMARD,—Of Counsel for Plaintiff.
F. VICTOR,—Plaintiff's Attorney.
M. CAMERLEN,—Of Counsel for Defendant.
C. GAUTRAY,—Defendant's Attorney.

30th *September* 1862.

The Plaintiff sued the Defendant for the sum of $ 470. 60, as the price of goods, (rice, ghee, &a,) alleged to have been sold and delivred, on 18th and 19th December 1861.

The sale and delivery were denied.

THE COURT said: The question is entirely one of the credibility of the witnesses. For the Plaintiff, his clerk, seemingly an honest and, for his position, a well informed person, affirms positively to the sale and delivery. A paper is produced, signed, as that witness stated, by a lad, a son of the Defendant, in which the receipt of all the articles is acknowledged. The writer of this paper could not be found, having apparently gone out of the way, when the usher wished to cite him to give evidence at the trial. The same witness deposes that the Defendant, when the account was shewn to him, did not deny the debt, but merely asked him to settle.

On other hand, the Defendant, who can't write, deposed, on interrogatories, that he never either ordered or received delivery of the goods, and never gave his son any authority to sign receipts. As to the non receipt of the goods, he is supported by an Indian woman who lived with him.

The Court is of opinion that the statements of these two persons are exposed to much suspicion. In a former suit, before this Court, (PISTON, Vol 1. Page. 42.) there were allegations made in an affidavit, by the present Defendant, entirely in contradiction to his deposition in the present case.

Without going into the vexed question of the effect of averments made by the parties, in previous suits, the Court considers that this contradiction in statement is not immaterial in judging of the veracity of this Defendant. But further, the demeanor and conduct of the Defendant, and of the woman in question, while under examination in Court, were not satisfactory.

The Court is, therefore, of opinion that the Plaintiff has sufficiently established his case. Judgment in terms of Plaint. Interest at 12 per cent. Personal execution, limited to three years.

Supreme Court.

EXÉCUTION D'UN JUGEMENT DE MAGISTRAT STIPENDIAIRE, —"WRIT OF INJUNCTION," — "WRIT OF MANDAMUS,"—POUVOIRS DU PROCUREUR ET AVOCAT GÉNÉRAL.

EXECUTION OF A JUDGEMENT OF STIPENDIARY MAGISTRATE;—WRIT OF INJUNCTION,—WRIT OF MANDAMUS,—POWERS OF THE PROCUREUR AND ADVOCATE GENERAL.

BRUNET & Co., Plaintiffs.
Versus.
DE BOUCHERVILLE, Defendant.

Before:
His Honor the CHIEF JUDGE and the Honorable N. G. BESTEL 2, P. J.

E. DUPONT,—Of Counsel for Plaintiffs.
F. ROBERT,—Plaintiffs' Attorney.
S. J. DOUGLAS,—of Counsel for Defendant.
J. BOUCHET,—Defendant's Attorney.

30th September 1862.

On cause being shewn, by the Substitute Procureur General, upon the Rule Nisi served upon the Defendant, the Stipendiary Magistrate of the District of Saranac: "Why a "Writ of Mandamus should not issue, commanding him, the said Stipendiary Magistrate, to carry into execution a Judgment "given by him on the 1st day of August 1861, "between Ernest D'Usienville, then proprietor of the *Frederika* Estate, in the said District and the Indian laborers of the "Estate."

DUPONT, of Counsel for Brunet & Co, in reply, stated to the Court that the Stipendiary Magistrate had expressed, not only his readiness, but even his anxiety to carry out the Judgment aforesaid.

The Court then naturally enquired why the Stipendiary had not done so. To this it was answered, in the words of the affidavit of the said Magistrate, dated the 8th September instant,—"That, in execution of such Judg"ment, and to satisfy the same, I have caused "a certain number of the carts and mules "belonging to the said Estate *Frédérika* to "be seized. That before such seizure could be "carried into effect, I was, on the third day "of July last, served with a copy of writ, "issued by His Honor Charles Farquhar "Shand, Chief Judge of Her Majesty's Su"preme Court, strictly enjoining and com"manding me that I do abstain from proceed"ing to the sale of the mules and carts of the "said Estate *Frederika*.

"That, in consequence of such Writ, I "abstained from carrying into effect the sei"zure, so made, of the mules and carts of the "Estate *Frederika*, either for the purpose of "the payment of the wages in arrear, or for "the purpose of realizing the sum necessary "to reimburse Messrs. Brunet & Co. of their "said claim for provisions, having been advi"sed, by the law officers of the Crown, that "I could not safely sell the said carts and "mules, for either purpose, in the face of the "said Injunction."

On reference, however, to the Injunction alluded to in the above affidavit, we find that the Stipendiary Magistrate is prohibited from selling the mules and carts of the said Estate *Frederika*, seized "for payment of wages due to the laborers employed on the said Estate;" and that the Injunction in no wise interfered with the exercise of the Stipendiary Magistrate's power (if any and whatever they may be) as to the sale of the said mules and carts, for the purpose of paying "the claim of Brunet and Co."

In addition to the reasons assigned in his affidavit, by the Stipendiary Magistrate, for not carrying his Judgment into execution, an answer, of the 1st August last, to a communication, from "Brunet and Co." of the 30th July last, was read to the Court, wherein the Magistrate, having expressed his readiness to carry his Judgment into execution, accounts for his not doing so in these words: "Had I "not been informed by the Honorable the "Procureur General, in his letter addressed "to me on the 8th July 1862, that he was "clearly of opinion that I cannot settle any "of the stock or plant of the Estate, in order "to realize the amount due to Messrs. Brunet "and Co." "In presence" is added "of so "positive a statement, I dare not take upon "myself to act in opposition to the opinion of "the Honorable the Procureur General, and "I deeply regret that I cannot, in consequence, "cause my Judgment to be executed in order "to enforce payment of the sum justly due to "you for your supplies."

The Honorable the Procureur General, by his learned Substitute, emphatically and repeatedly denied having issued any order, no such power belonging to his Office. All that was done being an expression of opinion merely, to the Stipendiary Magistrate, that upon the facts stated, he should not execute his Judgment.

The only cause assigned, by the Stipendiary Magistrate, for not carrying his Judgment into execution, namely, the presence of an adverse opinion of the Honorable the Procureur General, is one of which, it is evident, a Court of Justice cannot take cognizance.

This is plainly not a case for the issueing of the high prerogative Writ prayed for.

Rule therefore dismissed with costs.

Supreme Court.

CHARTE JUDICIAIRE,—APPEL AU CONSEIL PRIVÉ,—COMPÉTENCE.

Lorsque, par un Jugement de la Cour Suprême, certains meubles ont été déclarés la propriété de A, son adversaire B. ne peut, pendant l'appel qui est fait de ce jugement au Conseil Privé

de Sa Majesté, obtenir de la Cour Suprême l'autorisation de faire évaluer les dits meubles par experts, dans le but de se servir de ce Procès Verbal d'expertise si le jugement de la Cour venait à être infirmé.

CHARTER OF JUSTICE,—APPEAL TO THE PRIVY COUNCIL,—COMPETENCY.

Where the property of certain moveables had been awarded by this Court to A, and his opponent B, appealed to Her Majesty, the Court could not, pending the appeal, grant authority, on the application of B, to have the articles valued by experts; their report to be used in case of a reversal of the Judgment.

Number of Record: 6866.

ROCHECOUSTE & Anor., Appellants.
Versus.
DUPONT & Ors., Respondents.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2d. P. J.

E. LECLÉZIO JR.,—Of Counsel for Appellants.
C. LABORDE,—Appellants' Attorney.
G. B. COLIN,—Of Counsel for Respondents.
W. FINNIE,—Respondents' Attorney.

29*th October* 1862.

(See *Vol.* I. *P. P.* 97 *and* 101.)

This was an application to the Court to grant authority to have an *expertise* made of the value of certain articles of machinery, &c., on a sugar estate, now in the possession of Mr. Dupont, in terms of the Judgments of this Court of 6th August 1861.

LECLÉZIO JUN. for Appellants: The Messrs. Rochecouste have appealed to Her Majesty in Her Privy Council, against the above Judgment, and now submit that, in the event of the Judgment of this Court being set aside, there would be no wrong of ascertaining the value of the articles in question, which are in daily use by our opponents and must, necessarily, be deteriorated from day to day; that this could only be remedied by proper judicial steps for ascertaining their value by experts. In the case of *Faduilhe vs. Davidson*, 5th July 1845. BRUZEAU. Page 82. The Court ordered a Report of experts, to ascertain the value of the subjects in dispute, so as to determine the competency of an Appeal to the Privy Council: See also CARRÉ. I. Page 690, N. Bis 587.

J. B. COLIN *contrà*: This application is altogether incompetent. The case is out of this Court. This is not an application for execution, pending appeal, or for any necessary or even useful enquiry. In any view it is altogether premature.

THE COURT: It does not appear to us that, even were the expediency of working such an *expertise* more apparent than it is, we have any power or authority to interfere. The suit, regarding the property of these articles, is now out of this Court, and before Her Majesty in Council. We are *functi officio*. This is not an application *ad servandam rem*, which necessity might dictate and impose upon the Court the duty of granting. At the utmost, the report now asked might merely be an element in assisting parties hereafter, to ascertain the value of those moveable, in a position of matters, as yet purely hypothetical, and which may never exist. The authorities relied on do not apply here. The application may be very suitable for the Higher Court in England, but we cannot interfere.

Rule discharged, with Costs.

Supreme Court.

PROPRIÉTÉ, —PREUVE,—PRESCRIPTION DE DIX ANS, —POSSESSION, —"FOLLE ENCHÈRE" C. C. ART. 2265,—C. P. C. ART. 735.

PROPERTY, — EVIDENCE, — PRESCRIPTION OF TEN YEARS, — POSSESSION,—RIGHT TO SUE AND EFFECT OF A "FOLLE ENCHÈRE," — C. C. ART. 2265,—C. OF C. P. ART. 735.

Number of Record 6995.

DUPUY & ORS. Plaintiffs.
versus.
LAMARRE, Defendant.

Before:

His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL, 2d P. J.

G. B. COLIN,—of Counsel for Plaintiffs.
C. LABORDE,—Plaintiffs' Attorney.
E. LECLÉZIO JUNIOR, — of Counsel for Defendant.
E. LECLÉZIO SENR,—Defendant's Attorney.

17*th October* 1862.

In this case, the Plaintiffs, as alleged proprietors of one half of an Immoveable Estate situate at the *Vallée des Prêtres*, called upon the Court to decree and order that the Defendant, now in possession of the whole subjects, should be condemned to abandon and deliver, to the Plaintiffs, the said alleged half, with $ 10,000, as damages for the wrongful occupation thereof.

The Defendant pleaded that the Plaintiffs had no right, title or capacity to sue;—that they are not the owners of the piece of ground claimed,—and that the Defendant has, for a long time, been the true owner thereof, and

in due possession of the same, having purchased it, in due form of law.

The material facts, as established at the trial, were the following: The subjects in question formed part of a landed property, which one Aubin Dupuy had bought, at the Bar of the late Court of First Instance, on the 28th January 1821, for the sum of $ 15,050.

By notarial deed, dated 4th June 1831, Aubin Dupuy and his brother, the Plaintiff Hippolyte Dupuy, agreed to share and divide the immoveable property. The said deed of division referred to a plan, prepared by a Sworn land Surveyor, setting off the two shares into which the parties had agreed that the lands should be divided. The first, or higher portion, as it was termed, was set off for the said Aubin Dupuy. The second, or lower portion, for the Plaintiff Hippolyte Dupuy, who, with his children, the other Plaintiffs, are now in right of his interest, under the said deed, whatever that interest may be.

The subjects were resold, by way of "Folle Enchère," on 6th February 1833, "La dite "Folle Enchère poursuivie faute par ledit "sieur Aubin Dupuy d'avoir satisfait aux "conditions insérées au Cahier des Charges "des autres parts, ainsi qu'il résulte du bor- "dereau de collocation délivré auxdits sieurs "Mauvis frères, le 19 Mai 1830, et de l'exploit "de sommation fait audit sieur Aubin Dupuy, "par Charles Legendre, huissier, le 22 Octobre "1832."

On the 20th of the same month the property was awarded to Mr. E. Declaix, for the sum of $ 15,000, and after the usual formalities, then in use, the adjudication was confirmed to him, as purchasing for behalf of François Dupuy and Dame Françoise Diord, wife of Aubin Dupuy.

The property was again sold, by way of "Folle Enchère," in 1848. It was awarded, on the 13th December of that year, to Mr. Leclézio, acting for the Defendant Lamarre, and on the 7th February 1849, after certain outbiddings, it was finally adjudged to the same parties.

Previous to this sale, a portion of the lands, measuring 248 acres, or thereabouts was struck out from the exposure, having been purchased by Lamarre, from the said Aubin Dupuy and wife, by notorial deed of 1st May 1838.

The Defendant Lamarre had been in possession of both portions of the Estate from the dates, respectively, of his acquisitions.

A. B. Colin, for Plaintiffs, argued: The property so bought, at the bar of the late Court of First Instance, in 1821, by my client's brother, was really bought for him and my client jointly. I entered into possession, and the true state of matters was evidenced by the notarial deed of division between us in 1831. I am therefore proprietor, first by deed, and secondly by prescription running on that deed. No doubt my title is dated in 1831, but it refers to the previous deed of 1821, and I had been in possession all along, so my position is covered by Art. 2265 of the C. C. My possession of 10 years is enough. The "Folle Enchère" of 1833 was without authority. My title was good by prescription. Besides, no notice whatever was given to me of the proceedings, still less can I be affected by the "Folle Enchère" of 1848. We had no notice of these proceedings; my client had lost his wife and his affairs were in great difficulty. If I am due any money to the vendors. I may be expropriated. But that is quite a different matter. The 1st. "Folle Enchère" was bad. The heirs of the original proprietors did not inherit the vendor's right, so as to entitle them to go in with a "Folle Enchère. The law in France was much changed in 1831. C. C. P. Art 735. Such power was there given, for the first time, to others than the vendors. This is in favor of my argument. The law gives caption of the body, in cases of "Folle Enchère," not in resolutions of sales, except damages are awarded. The vendor's *privilège* is personal, except, it may be, in commercial cases. It cannot pass by a *transport*, so as to entitle the assignee to sue a "Folle Enchère." (Persil, Reg. Hypothec. Vo. 3. Section 2. No. 11. Sirey. 17. 2. 169.)—I have a prescriptive title here, altogether independant of the rights of the apparent vendee, my brother.

E. Leclézio Junior, for Defendant: My title is perfect. There was a licitation, by the heirs of the former proprietor: Aubin Dupuy appeared and purchased; as to any participation, by his brother, the present Plaintiff, in that purchase, I knew and could know nothing. He never appeared at all in the matter. The purchaser's title is set aside, on a resale, as he had not performed his obligations. How can any right accrue to the Plaintiff from an annulled sale? The alleged deed of division can establish no right in his favor. "*Resoluto jure dantis solvitur et jus accipientis.*" The "Folle Enchère" took place and swept away all the previous procedure just like a resolution of sale. (Letord. V. 2 P. 392. Biochs, *in loco.*) The "Folle Enchère" is unimpeachable; the record bears expressly that the persons pressing it were holders of the *bordereaux de collation*, what better title could there be? It is said that the later law in France, introduced a new Rule This is not the case. It is merely declarative of what the law was (Sirey 39: 2: 213). How could a notice be given, to the Plaintiff, of whom no body knew anything. Notice is not given to a *tiers détenteur*. (Biochs.—"Folle Enchère" No. 19 *ad fin.*) Any possession the Plaintiff ever had, was abandoned in 1845, and that, without protest, and I have possessed ever since.

G. B. Colin replied.—It is said, on the other side, that they know nothing of my client, but my deed proves my right. I say the sale to Lamarre was bad, and that is an end of the Defendant's case. (Sirey, 1832, 2, 260.) The decision quoted, from the Court of Bordeaux, is really in my favor. There must be *a Cessim.* I might have proceeded by a *tierce, Opposition* — or intervention, but I bring my rights forward under an *actio principalis* which is the best of all modes. There is no possession really adverse to mine. No prescription can assist the other side, when the title is null, and in fact prescription is not pleaded.

JUDGMENT.

We are of opinion that the Plaintiff's case has failed. The whole basis of his contention is that the purchase, made in 1821, by his brother, sole by in his own name, was truly for behalf of both brothers equally. But of this there is no evidence whatever, excepting a statement, in a deed passed between those brothers, in 1831. This may be all very well, so far as they themselves were concerned, but such statements cannot affect the interest of third persons. Besides, the rights of Aubin Dupuy, as purchaser, whatever they were, and for whomsoever he was acting did not come to maturity. He failed to perform the conditions of the contract, and the subjects passed into the hands of the Defendant, under proceedings by way of *Folle Enchère.* The objections stated against these proceedings are not, in our opinion, tenable. The Defendant remains proprietor of the subjects, by a legal and valid title. The Plaintiff has remained silent for a long series of years, and has made no reclamation, till the institution of the present suit.

Judgment must go for Defendant, with costs.

Supreme Court.

Contravention aux lois sur les guildives,— Amende,— Emprisonnement,— Ord. No. 8 de 1861 et 26 de 1853.

Breach of Distillery laws,—Fine,—Imprisonment,—Ord. No. 8 of 1861 and 26 of 1853.

THE QUEEN, Plaintiff.
versus
MAILLOU & CHARBONIER, Defendants.
Before:
The Honorable N. G. Bestel, 2d. P. J.

S. J. Douglas,—Subs. Proc. & Adv. General.
E. Dupont,—Of Counsel for Maillou.
L. Rouillard,—Of Counsel for Charbonier.

30th September 1862.

On the 11th. August last Her Majesty's Procureur and Advocate General filed, against one Louis Maillou, tailor, and one Adolphe Charbonier, shop-keeper, an Information, for that they, the said Louis Maillou and Charbonier "did distill a certain quantity to wit: "thirty gallons of sprits, without being licen- "sed so to do, against the form of the Ordinan- "ce in such case made and provided, where- "by and by force of the Ordinances in such "case made and provided, the said Louis "Maillou and Adolphe Charbonier have "incurred a penalty not exceeding £ 400, and have become further liable to imprisonment for a period not exceeding 18 months. and the apparatus found on the premises on which such illicit distillation was carried on, has become liable to forfeiture.

2nd. And Her Majesty's said Procureur and Avocate General further gives the Court here to understand, and be informed, that; heretofore, to wit: on the ninth day of August last, in the town of Port Louis, the said Louis Maillou and Abolphe Charbonier, not being persons licensed to keep and use a still, and not being known as regular and lawful makers of stills, were found to have in their possession, on certain premises situate in Little Mountain street, in the town aforesaid, a certain still which was neither declared, nor under removal accompanied by a written permit, granted by the Collector of Internal Revenues, nor under seals affixed by the said Collector of Internal Revenues, against the from of the Ordinance in such case made and provided, whereby, and by force of the Ordinances in such case made and provided, thr said Louis Maillou and Adolphe Charbonier have incurred a penalty not exceeding £ 50, and become liable to imprisonment for a period not exceeding 3 months.

(Article 3 of Ordinance No,26 of 1853 and Article 9 and 11 of Ordinance No,8 of 1861.)

And the said still has also become liable to forfeiture.

3o.—And Her Majesty's Procureur and Advocate General further gives the Court here to understand and be informed that, heretofore, to wit on the day and year aforesaid, a large quantity, to wit: 100 gollons of wash, prepared for distillation, was found in the possession of the said Louis Maillou and Adolphe Charbonier, on the premises aforesaid, the said premises not being a licensed distillery, in the wash vats contiguous thereto, against the form of the Ordinance in such case made and provided, hereby, and by force of the Ordinances in such case made and provided, the said wash has become liable to forfeiture and the said Louis Maillou and Adolphe Charbonier have incurred a penalty not exceeding £ 100, and have further subjected themselves to imprisonment for a period not exceeding 6 months,

(Article 6 of Ordinance No 26 of 1853 and Article 11,of Ordinance No 8 of 1861.)

4o.—And Her Majesty's said Procureur and Advocate General further gives the Court here to understand and be informed that heretofore, to wit: on the day and year aforesaid, a certain quantity, to wit : 30 gallons of spirits, which had before then been illicitly removed, were found on the premises aforesaid, the said premises being then occupied by the said Louis Maillou and Adolphe Charbonier, the said Louis Maillou and Adolphe Charbonier being cognizant of such spirits being there deposited, against the from of the Ordinance in such case made and provided, whereby, and by force of the Ordinances in such case made and provided, the said Louis Maillou and Adolphe Charbonier have incurred a penalty not exceeding £ 200, and have become liable to imprisonment for a period not exceeding 12 months.

(Article 29 of Ordinance No. 26 of 1853, and Article 11. of Ordinance No. 8 of 1861.)

On the arraignment, the Prisoner Charbonnier pleaded *Guilty.*"

But Maillou pleaded *Not Guilty.*

The evidence for the Prosecution shews the parties charged, on the day of the alleged breaches of the Distillery laws, in the very act of removing some part of a still, on certain, premises, rented by Maillou ; a boiler for boiling wash, wash and refuse of wash and rum were found on the premises, and close to, or not very distant from the boiler. Several bags of coarse sugar, fit for making wash for distillation, were also found on the premises and close to, or not very distant from the boiler, so, also a complete still, which had been ordered by Maillou, and paid for by him, in a Bill of $200. The still intended, as it was said by him, to the maker thereof, for Madagascar, was found on the premises rented by him, the rent of which, like the cost price of the still, was paid by him.

In order to rebut the force of that evidence against him, Maillou has alleged that he had underlet to Charbonier the premises rented by him, of Maillou, and was the sole occupier thereof. That Charbonier was licensed to sell spirits, in a shop situate on the premises, that he, Maillou, was altogeter a stranger to all that was going on in the premises.

But if so how came it to pass that he and Charbonier should have been found in the act of removing some portion of the still ; and why should he have fled on the apparition of the Inspectors of Distillery.

That he, Maillou, never lived on the premises, is no proof of his not having had an interest in the fraudulent distillation carried on by the occupier of the premises.

Maillou is therefore declared guilty of the several offences of which he is charged in the several Counts of the Information.

For the offence charged in the *First Coun*- Maillou is condemned to £100 and imprisonment not exceeding 3 months. (Article 67 of Ordinance Nr. 26 of 1853.)

For the offence in the *Second Count,* he is condemned to a fine of £ 12. 10 s., and one month's imprisonment.

For the offence in the *Third Count,* he is condemned to a fine of £25 and one month's imprisonment.

For the offence in the *Fourth Count,* he is condemned to a fine of £50 and one month's imprisonment.

And the said Charbonier, having pleaded guilty, to the several Counts of the Criminal Information, is condemned, on the *First Count,* to £100.

Second Count to £12.10 s.

Third Count to £25.

Fourth Count to £50, and the forfeiture of the still, sugar, wash and spirits seized.

The fines above mentioned, to be paid within a delay of fifteen days, from this day, and in case of non payment the said Maillou to undergo further imprisonment for the space of 6 months ; and the said Charbonier for the space of six months.

The fines and forfeitures to be effected according to the Ordinance in such case made and provided.

The several terms of imprisonment to be undergone successively.

Costs against prisoners.

Bail Court.

VENTE D'UN IMMEUBLE,—BAIL,—COMPENSATION,—C. C. ARTS. 1299, 1319 & 1714.

Le locataire qui, par un accord privé avec son propriétaire, s'est engagé à faire à l'Immeuble loué certaines améliorations, à la condition de retenir sur le prix de son Bail la moitié de ses dépenses, a le droit de se prévaloir de cet accord vis à vis de l'acquéreur de l'Immeuble qu'il occupe.

SALE OF AN IMMOVEABLE PROPERTY,—LEASE,—SET OFF,—C. C. ARTS. 1714, 1319 & 1299.

Where a tenant was bound, in a formal deed of lease to make certain meliorations on the property, with the right of retaining half the cost out of the rent, the clause was found effectual against a purchaser of the subject.

Number of Record: 292

MAUGENDRE & Ux., Appellants.
versus.
SMITH & HILL, Respondents.

Before:
His Honor the CHIEF JUDGE.

C. M. CAMPBELL—Of Counsel for Appellants.
U. HITIÉ,—Appellants' Attorney.
V. NAZ,—Of Counsel for Respondents.
SLADE and Banks,—Respondents' Attornies.

29th October 1862.

In this suit Mr. and Mrs. Maugendre sued the Defendants, for the sum of $ 144, for 12 months' rent of a house and grounds, at the rate of $ 12 per mensem, from the 10th April 1861 to the 10th April 1862. The Defendants admitted the rent, but claimed a compensation, or set off, of a greater amount, namely $ 213.85, of which they had duly given notice to the Plaintiffs.

The learned Magistrate admitted the set off and dismissed the case, with costs against the Plaintiffs.

They appealed.

The following were the facts of the case. On the twenty fourth April 1860, Miss Marie Louis Caëtanne, the then proprietor of the house, let it to the Defendants, by a regular notarial act, for the term of three years, (to begin on the 10th. January 1860) at the rent of $ 12 per month. The lessees had the right, if they pleased, to renew the lease at its expiration, for two years, on the same terms.

In addition, the lease contained the following clause:

" 1o. Qu'un mur sera construit par les " preneurs, avec des pierres provenant de deux " fours à pain existant sur le dit terrain em " placement, les frais de laquelle construction " seront supportés, moitié par la bailleresse " et moitié par les preneurs; et lequel mur " séparera le terrain présentement loué de la " propriété de Mr. Baya.

" 2o. Que les preneurs construiront égale- " ment un entourage en bois, à moitié frais, " pour séparer le terrain ci-dessus décrit, du " surplus de la propriété de Mademoiselle " Marie Louise Caëtanne.

" 3o. Que le compte des dépenses fait par " les preneurs, sera réglé sur comptes acquittés, et que la portion à la charge de Mlle. " Caëtanne sera déduite du loyer.

" 4o. Et que les preneurs n'auront pas le " droit d'enlever, à l'expiration du présent " bail, tous les bâtiments généralement quel- " conques, qu'ils auraient pu bâtir sur le sus- " dit terrain, pendant la durée du dit bail; " lesquels bâtimens demeureront au contraire " la propriété de la bailleresse."

On the 10th April 1861 Miss Caëtanne sold the property to the present Plaintiffs. They were made fully aware of the lease, and they intimated the sale to the tenants, the Respondents in the present Appeal.

On the 8th July 1861, Miss Caëtanne sued the tenants, before the District Court, for 15 month's rent of the premises, from 10th January 1860 to 10th April 1861. They failed to produce receipted accounts for the works which they alleged they had made on the property under the lease, and they were condemned to pay the full rent, as claimed.

On 2nd October 1861, the Defendants raised suit before the District Court, against Miss Caëtanne concluding for payment of $ 213.85, being the moiety due them, under the deed of lease, of an account supported by vouchers for the work done, in building the wall and the wooden pailing. The Court sustained the objection, that by the deed of lease, the said costs of wall were to be paid out of the rent becoming due, and Judgment went against the Defendants, with costs.

The present suit was subsequently raised by the purchasers, claiming the full rent, and refusing to admit the counter claim, or set off, in favor of the tenants, for the value of the work they had executed. In the Court below, as we have already seen, the learned Magistrate gave effect to the tenants' claim. The proprietors brought up this Judgment and pleaded.

CAMPBELL for Appellants: My clients are the proprietors of the subjects by a legal purchase. No doubt there was a lease which we knew of and acknowledged, but in the circumstances, the rents are payable to us, without any deduction such as that set up by the tenants. Their claim is a personal one against the former owner; it does not pass with the lands like a mortgage, which is a real encumbrance. Their demand is quite a different thing altogether. It does not permanently burden the land.

NAZ for Respondents: The lease to my clients was a formal *acte authentique* and had a positive date. It was consequently quite effectual against any purchaser, whether it was specially referred to in the deed of sale or not. C. C. Article 1743. We performed the obligations which we undertook; we finished the improvements on the lands under lease, and are entitled

to payment, in terms of that contract. The purchaser had full knowledge of the lease; indeed he took good care to intimate the sale to us, that we might pay our rents to him. This we are willing to do, but we must be allowed the deductions for improving the property. C C. 1714 and following. The seller could only sell the property under burden of the lease: *Nemo potest transferre plus quam habet.* (Bellieux on Article 1743, C. C. Volume VI.) The old rule of the Roman Civil Law: *Emptorem*, is abolished by the Code. (Sirey 27 : 2 : 116. Troplong. Vente. Nos. 473, 489 and Seq.) To refuse us relief here would operate gross injustice, as we would get no payments for the permanent improvements we have made on the lands. Our former failure arose from mere tenical difficulties. An *acte authentique* is good against the makers and their representatives. C. C. Article 1319 : " L'acte authentique fait pleine foi de la con- " vention qu'il renferme entre les parties con " tractantes et leurs héritiers ou ayant cause. " Néanmoins, en cas de plainte en faux prin- " cipal, l'exécution de l'acte argué de faux "sera suspendue par la mise en accusation ; et, " en cas d'inscription de faux faite incidem- " ment, les tribunaux pourront, suivant les " circonstances, suspendre provisoirement " l'exécution de l'acte." All I ask here is that the *acte* shall be held valid against the *ayants cause.*

Campbell replies : The work was done and completed long ago, and before the sale. If the tenants failed in recovering payment, *sibi imputent*, they have themselves to blame. Not having made good their alleged claim of compensation against Miss Caëtanne, they cannot do so now; Art. 1299, on the law of compensation, is quite in my favor; " Celui qui a " payé une dette qui était, de droit, éteinte " par la compensation, ne peut plus, en exer- " çant la créance dont il n'a point opposé la " compensation, se prévaloir, au préjudice des " tiers, des privilèges où hypothèques qui y " étaient attachés, à moins qu'il n'ait eu une " juste cause d'ignorer la créance qui devait " compenser sa dette."

JUDGMENT.

It has been very much controverted, in France, whether the right conferred upon a tenant, by a lease, is one of a real or personal nature. The mass of authorities is in favor of the latter conclusion, though names of great weight, among which that of Troplong is conspicuous, are to be found on the other side. But after all, to say that a right is real or only personal, is merely to give us a name, unless, under the name are included the effects of the right so denunciated, which may enable us to determine the position of parties, in law, when disputes actually arise in Courts of Justice.

Without then attempting, by a too rigorous legal logic, to determine whether the right of lease falls more properly within the category of real or of personal rights, let us follow the perhaps more profitable course of looking at the actual enactments of the law.

Now it is positively fixed, by article 1743 of the Civil Code, that the holder of an authentic lease with a certain date, cannot be ejected by the purchaser of the subjects. The latter must take the property under burden of the lease. He just steps into the shoes of the seller. The law has been illustrated by various decisions of the Courts. Thus it has been determined, (Sirey 27. 2. 116.) " L'acquereur est tenu " d'exécuter tous les baux authentiques passés " par son vendeur, même tel bail qui ne devait " commencer que plus ou moins longtemps " après l'expiration d'un premier bail, existant " et connue, au profit du fermier actuel; la loi "romaine *Emptorem* a eté abrogée par l'Article " 1743." And again " (Sirey. 20 : 1. 327.) " L'acquéreur d'un immeuble qui a eu " connaissance, au moment de la vente, qu'un " bail authentique de cet immeuble existait " encore pour plusieurs années, et que les " arrèrages en avaient été payés d'avance " par le fermier, n'est pas recevable à action- " ner ce fermier pour le paiement de ces " mêmes arrèrages, sous prétexte qu'ils ont " dû faire partie de l'immeuble vendu. Il ne " le peut pas même comme subrogé aux " créanciers hypothécaires qu'il aurait désin- " téressés." The purchaser is in no better position than his seller, and is in no worse. Is there any reason why the result should be different in the present case. The lease is an *acte authentique*, and has also a *date certaine.*

The tenants were bound, under a *condition essentielle*, to make certain improvements, on the subjects, and were entitled to retain one half of the expense of those improvements, out of the rents payable by them to the proprietor. The lease was to endure for several years, and they were not bound to execute the improvements by any fixed term, so they might have made them towards the close of the lease, and claimed the corresponding deduction from the rents ultimately payable by them in the last months of their possession. About one year after the commencement of the lease, the property passes, by sale, into the hands of third parties, the present Appellants, to whom the lease was communicated, and who consequently could not plead ignorance of its terms, or of a clause regarding meliorations to be made for the benefit of the property. They saw the stipulations of the contract on its face; they had no reason to believe that, at so early a stage of the lease, the improvements had been finished and paid for, but the reverse; in the deed of sale they admit: " l'acquereur déclarant parfaitement " connaître l'objet de son acquisition, pour " l'avoir vu et visité et en être satisfait." The improvements were not then completed. It is said that the Plaintiffs, now Respondents, made

two attempts to recover the amount from the original proprietor of the subjects and failed. This appears to be true, but their demands broke down on grounds of a formal and tecnical nature, not for want of justice or merits in their claim.

It appears to the Court that the Judgment of the learned Magistrate is a sound one, and ought to be maintained. Appeal dismissed, with Costs.

Bail Court.

APPEL D'UN JUGEMENT DE LA COUR DE DISTRICT, — PARTIE CIVILE, — BILLET A ORDRE,—DÉPOT DE LA SOMME.

Lorsque le souscripteur d'un Billet à Ordre refuse d'en payer le montant sous le prétexte que le porteur du dit Billet ne le possède pas de bonne foi, la Cour peut ordonner le paiement du Billet et le dépot de la somme au Greffe pour être versée ultérieurement à qui de droit.

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT,—CIVIL SIDE,—PROMISSORY NOTE,—DEPOSIT OF THE SUM.

When the maker of a Promissory note refused to pay to the holder, on the alleged ground that he was not a "bona fide" holder, the Court ordered the money to be paid to the Registrar, leaving the question of the real property in the note to be thereafter discussed, if necessary, by the persons interested.

Number of Record:

HITIÉ, Appellant.
Versus.
PICOT, Respondent.

Before:
His Honor the CHIEF JUDGE.

G. B. COLIN,—of Counsel for Appellant.
U. HITIÉ, - Appellant's Attorney.
C. M. CAMPBELL,—Of Counsel for Respondent.
W. FINNISS,—Respondent's Attorney.

30th September 1862.

This was an appeal from the District Court of Port Louis (Civil Side.)

The Plaintiff Picot sued the Defendant Hitié, on a promissory note for $ 200, granted by the latter, dated 6th August 1859, and payable on 1st August 1860. The Plaintiff's name was filled up in a handwriting different from the body of the note. The defence was that the Plaintiff was not *a bona fide* holder, and an offer of proof of fraud was made.

THE COURT said: *Prima facie*, every presumption is in favor of the holder of a bill of exchange or promissory note, and an acceptor of a bill, or maker of a note, must satisfy the obligation he has undertaken, by honoring his signature; but, on payment, he is undoubtedly entitled to a good and valid discharge against all the world. When allegations are made, such as are advanced in this case, a relevant defence is raised against immediate payment to the Plaintiff; the Court will protect the debtor, by ordering him to pay the amount (as indeed his Counsel has offered to do) into the hands of the Registrar.

The Court, therefore, admits the appeal and orders the Defendant to pay the amount to the Registrar, within two days, the Registrar, thereafter, to pay the amount over to the Plaintiff, if no legal steps are taken, by any third party, to make good his title to the money paid to the Registrar.

Costs to neither party.

Supreme Court.

SAISIE ARRÊT,—DEMANDE EN NULLITÉ,—TIERCE OPPOSITION,—C. DE P. C. ART 1474, —REG. DE LA COUR No. 79.

La demande en nullité d'une saisie arrêt, dont la validité a été prononcée en chambre, ne doit pas être introduite par voie de simple motion mais par tierce opposition.

ATTACHMENT, — DEMAND IN NULLITY,— "TIERCE OPPOSITION,' — C. OF C. P. ART. 1474,—RULES OF COURT No. 79.

A Judgment by the Judge at Chambers, validating an attachment, cannot be set aside in Court by a third party on simple motion. He should proceed by way of "Tierce Oposition" and notice with summons.

CANOT, Plaintiff.
versus
HITIÉ, Defendant.

Before:
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL, 2d. P. J.

J. L. COLIN,—Of Counsel for Plaintiff.
E. DUCRAY,—Plaintiff's Attorney.
G. B. COLIN,—Of Counsel for Defendant.
U. HITIÉ,—Defendant's Attorney.

17*th October* 1862.

Hitié, as creditor of Henry Senèque, Doctor of Medecine, on 2nd May 1862, recovered Judgment against him, in the Supreme Court, for the sum of £312.75. On this Judgment execution issued, and on 25th June 1862, His-

tié attached, in the hands of Henry Collett Bury, Master of this Court, "all sums of "money and other property whatever which "you now owe or may hereafter owe, on any "account whatever, to the said Henry Senè-"que."

On 1st July, summons issued for validity of attachment, against Senèque, who left default.

On 9th July, the attachment was validated by the Judge at Chambers.

On 27th August Hitié was called, on a summons in Chambers, by Jean Désiré Canot, to shew cause why the attachment validated, as above mentioned, should not be cancelled and annuled.

On 3rd September, the Judge at Chambers, on hearing the attorney for Cannot, and Hitié personally objecting, referred the matter to the Court.

The case having been called in Court.

G. B. Colin, for Hitié contended :

I am a creditor, with an attachment duly validated and confirmed by this Court. No Judgment of the Court can be set aside by such procedure as that adopted in the present instance, taken in Chambers. There is not even an affidavit of facts or alleged facts. I know nothing of the debt said to be due to Canot, and no explanation has been offered to me.

J. L. Colin for Canot. Senèque the debtor duly assigned to me this fund, before the proceedings, by Hitié at Chambers, took place. The money was part of the price due by Mrs. James Currie, the purchaser of an estate, in which Senèque had a share. My *cession* was duly intimated to Mr. Currie, so the fund lying in the Master's hands was my property before the attachment issued. What my case was, Hitié knew plainly. I served all the documents upon him, at Chambers, and this gave him full information. The course I followed was the usual one and sanctioned by the Schedule to the Chambers Ordinance, and also the practice in England. Chitty V. 2. P. 1412.

The Court : The course of procedure here followed is not correct. Canot was no party to the proceedings at Chambers, and after Judgment validating the attachment had been given, he could not get his remedy, by simple motion. The procedure should have been according to the summary form allowed by *"tierce opposition"* under Article 474 C. C. P. and Rule of Court No. 79. The Article runs thus.

Article 474 " Une partie peut former *Tierce Opposition* à un Jugement, qui préjudicie à " ses droits, et lors duquel, ni elle ni ceux " qu'elle représente, n'ont été appelés."

Rule 79 : Applications for validity of attachments, cancellation of inscriptions of mortgages, partition of property, " requête " civile " and *Tierce opposition*, and other applications of a similar nature, shall be made to the Court, summarily, by notice with summons, unless the Court or a Judge should otherwise order, in any particular case.

" This Rule shall not effect divorce cases."

This motion must, therefore, be refused with costs.

Bail Court.

Appel d'un jugement de Cour de District.—Jugement par défaut,—Renvoi de la cause devant le Magistrat—Procédure.

Lorsqu'un jugement par défaut a été prononcé sans prendre connaissance des faits de la cause, la Cour peut ordonner, sur l'appel, que cette cause sera replaidée de nouveau devant la Cour de District, l'Appelant payant les frais de l'appel.

Dans quel délai et en quelle langue doit être fait l'acte de l'appel ?

Appeal from judgment of District Magistrate.—Judgment by default,—Remit of the case before the Magistrate,—Procedure.

Special circumstances in which the merits of the case not having been heard, the ~~payment~~ judgment by default was recalled and the case remitted to be argued in the Court below, the Appellant, as a preliminary, paying the costs of the Appeal

Delay within which an appeal must be taken, and in what language ?

Number of Record : 310

D'ETIENNE, Appellant.
versus.
FROGERAYS, Respondent.

Before :
His Honor the Chief Judge.

J. L. Colin,—Of Counsel for Appellant.
E. Duvivier,—Appellant's Attorney.
G. B. Colin,—Of Counsel for Respondent.
C. Laborde,—Respondent's Attorney.

7th November 1862.

This was a suit, instituted before the District Magistrate of Grand Port, in which the Plaintiff claimed payment, from the Defendant, of the sum of $150, being the balance of an account, for the measurement of a plot of ground belonging to the said Defendant, now Appellant.

On the day when the case came on in Court, the parties appeared. Plaintiff, represented by Mr. Sauzier, on the part of Mr. Attorney C. Laborde, Defendant present. Defendant pleads not indebted and states that he never had any transaction with the Plaintiff, that he never paid any money to the Plaintiff on account; that the letter produced before the Court, and signed D'Etienne, was written by his deceased wife, relative to some indians to assist, requested by her brother, to point out and open the boundaries; that the plan of the place was never deposed with him, that he will write to Mr. Lisis Cantin on the subject.

Case postponed for a fortnight, at the request of Plaintiff.

On 2nd September the case was called and postponed, at the request of the Plaintiff, to the 8th Instant.

The procedure in Court, on the 8th, are thus recorded in the Books of the District Court:

"Judgment for Plaintiff, with costs of suit, by default. Defendant here enters and announces his intention to appeal from Judment."

On the 13th September the Appellant addressed a letter to the Magistrate, in French, stating his intention to Appeal to this Court, and repeating the grounds of defence as stated by him, in Court, on the occasion when the parties appeared. The Recognizance, under the Appeal, is dated 16 September 1862.

G. B. Colin, for Respondent, objected to competency of the Appeal. By article 61 Ord. 34 of 1852:

"Every person so appealing, shall, within "five days from the date of the Judgment "exclusively, give notice in writing of such "intended appeal to the District Magistrate; "upon which notice, such Magistrate shall "immediately bind the party, so giving such "notice, by recognizance to Her Majesty, "with sufficient security of equal amount to "the sum and costs awarded, and the condi- "tion whereof shall be that such party, giving "such notice of appeal, shall appear, and "within a fortnight prosecute such appeal to "its conclusion, before the above named "Supreme Court, and pay such costs as the said "Court may award on such appeal. The party, "having so been bound by recognizance, shall "lodge his appeal in the Registry of the said "Court, and give to the Respondent notice of "the appeal within five days from the date of "the recognizance."

The appeal itself was too late on the 13th., and so far from the recognizance being entered immediately it was not subscribed till the 16th. These proceedings were all too late.

Farther, there was no notice of Appeal in English, in which language all pleadings must be written, in terms of the Royal Order in Council of 13th September 1845.

J. L. Colin for Appellant. There was no delay which can be fatal to the appeal. The day after Judgment was a Saturday, on which the Court did not sit; then came Sunday; so we only lost one day, namely Monday, as we gave notice on the following Tuesday. This was a sufficient compliance with the Rules of the Ordinance. The word "*immediately*" is not to be so strictly interpreted as is argued on the other side. (*Panienden vs. The Queen.* 16th October 1861. Piston Vol. I. Page 220) Besides the Statute orders the Magistrate to bind the party appealing immediately. If the Magistrate is in fault we are not to suffer. As to the language in which the notice of appeal was given, to construe the Ordinance of Councel so rigidly, would, in many cases, and in this, work positive injustice, which it is the duty of every Court to resist.

G. B. Colin, replied: This is not a question of a single day, as in the case quoted on the other side. The Recognizances here were not entered into till 8 days after Judgment was pronounced. The words of the Ordinance of 1852 are quite explicit, and I venture to say that this is the first time its enactments have been attempted to be infringed.

The Court. In this case, both parties were present or represented before the District Court, on 19th August 1862, and certain procedure towards ascertaining the merits of the dispute was gone into. After two adjournments, both at the request of the Plaintiff, the case was brought again before the Magistrate, on the 8th, when Judgment was pronounced against the Defendant, by default, as he did not appear. He seems to have immediately entered the Court, and instead of asking the Magistrate to recoll the Judgment just pronounced, and proceed to hear the case, he stated his intention to appeal from the Judgment to this Court, and he has followed up that course of action. The objections urged against the Appeal, in point of form, are certainly of a formidable nature, and in other circumstances would probably have been considered fatal. At the same time, it would appear that the Defendant, in the personal management of his own case, unwittingly committed a mistake, in intimating his intention of appeal to this Court, instead of asking the Magistrate to recall the Judgment by default, and go on with the case, which would probably have been at once done if the Court had it been so moved. The case has never been heard on the merits. The Court therefore, though not without hesitation, has arrived at the conclusion that the Defendant shall still have an oppor-

tunity of being heard ; but as all the difficulties have been of his own creation, he must, as a preliminary, pay his opponent's costs, since the date of the Judgment of 8th. September last.

The case is, therefore, remitted to the Court below, to recall the Judgment of the 8th. and allow the case to be tried, on condition of the Defendant D'Etienne previously paying the Plaintiff Frogeray's cost since that date.

All other questions of costs are reserved and the Magistrate to have power to dispose of the same, at the close of the case.

Bail Court.

BAIL,—PROPRIÉTAIRE ET LOCATAIRE,—RÉPARATION,—RES JUDICATA.

Le jugement obtenu pour le paiement d'un terme du bail ne peut, dans un second procès, pour la réclamation d'un second terme, servir à invoquer l'autorité de la chose jugée.

Ce jugement ne peut servir que comme preuve littérale.

LEASE,—LANDLORD AND TENANT,—REPAIRS,—RES JUDICATA.

A judgment, for the rent of one term, is not res judicata for the rent of a subsequent term, but may be used, in the second suit, in the way of proof.

Number of Record : 3479

FITZ PATRICK & Wife, Plaintiffs.
versus
TALBOT & WIFE, Defendants.

Before :
His Honor the CHIEF JUDGE.

E. LECLEZIO Sr.,—Of Counsel and Attorney [for Plaintiffs.
G. B. COLIN,—Of Counsel for Defendants.
F. ROBERT,—Defendants' Attorney.

6th November 1862.

On the 10th April 1862, the Plaintiffs, proprietors of the *Hôtel Masse*, in Port Louis, let it to the Defendants, for the period of five years, (with power of extension for 2 years additional), at the rent of $ 350 a month. The lease, among others, contained the following stipulations :

" Il sera dressé, entre les parties, un état " des lieux, qui devront se trouver en bon état " de location quant aux tapisseries, boiseries, " fermetures, clefs, peinture, serrures, vitres, " &a., que les preneurs s'obligent à entretenir " en bon père de famille, et à rendre au pro- " priétaire, dans un bon état, sauf l'usure."

A list of the repairs, required by the Defendant, was made out by him, and entitled : " Liste des Réparations à faire à l'*Hotel Mas-* " *se*, selon la demande de Mr. Talbot. "

This paper enumerated a great variety of repairs, to be done to the different rooms and parts of the Hotel. They were chiefly repairs of the nature of " *réparations de menu entretien.* " Among others, were enumerated certain repairs to "cloisons." " *et, sur le corps du bâtiment, quelques bardeaux pourris.* The Plaintiff wrote, at the foot of this document : " Je "m'engage à faire faire de suite les réparations " ci dessus décrites, et qui sont nécessaires à " l'*Hotel Masse*, mais je ne m'engage pas à " faire faire des portes qui n'existent pas sur " les lieux ; je ne puis pas m'engager non plus " à réparer une cuisine, qui doit être démolie " et rebâtie d'après le sous seing privé. Je " consens à réduire les loyers de l'*Hotel Masse* " à $ 200 par mois, tant que dureront les " grosses réparations.

" Port Louis, 16 Avril 1862.

(Signed) "Percy Fitz Patrick."

In this suit. the Plaintiffs asked payment of the full rent of $350, from 14th May to 14th June last. The defence, by the tenant, was : I am entitled to the deductions from the rent, agreed to by the Plaintiffs, as the repairs were then going on.

LECLÉZIO SENIOR, for the Plaintiffs : We sued the Defendants, in the District Court, for the first month's rent, *i. e.* from 24th April to 14th May, under deduction of $86 which we allowed for the days from 14th to 27th April, during the repairs when the rent was only $200. The defence was there, as I presume it will be here, that the repairs were not then executed, and so the lower amount of rent was all that was exigible ; but the Magistrate, after taking a proof by witnesses, gave Judgment in my favor. That must be *res judicata* for the rent of all subsequent months. SIREY 1831, 1, 41.

CHIEF JUDGE.—I will allow you to put in the record of these proceedings, in *modum probatione*, but I can't go further. That Judgment is not *res judicata* here ; it plainly wants some of the essential elements of a *chose jugée*, and I cannot, at once, shut the Defendants' mouth. Besides, for anything yet disclosed in the present case, there may have been some important change of circumstances before the month's rent now in suit was due, entitling the Defendants to urge compensation or some other plea.

The parties then adduced their witnesses.

It was established, in evidence, that the Plaintiff, in April last, has employed 18 workmen for 5 or 6 days and certain parts of some subsequent days, to repair the floors, partitions and roof of the Hotel, and to execute a variety of small repairs. These workmen executed all the repairs, both great and small which appeared to them to be necessary, and as the defects were pointed out, by the Defendant himself, who went over the premises, with the trademen.

On the other hand, the Defendant shewed, by his witnesses, that soon after the above repairs, the roof of the Hotel, tho' a new roof, leaked in several places, chiefly in a verandah, but also in a bed room; that, in the month of June, one workman considered that 2000 new *bardeaux* would be required to make the whole roof completely water-tight, but the roof was very large, and covered with perhaps 100,000 shingles. Another witness deposed that he had made it quite water-tight, by using only about 40 shingles.

That he had done this, by orders of the Defendant, after an interval of about a month, from the close of the first batch of repairs.

THE COURT. In the present case, it is not necessary to go into questions of what repairs of a subject, befall, by the rules of the Civil Code, in the absence of a positive stipulation, to be executed by the landlord, and what by the tenant. The parties here have entered into a special contract for the regulation of their rights and interests.

The only que tion, for the consideration of the Court, is this: were the heavy repairs, (*grosses réparations*) in the sense of the agreement of parties, completed, before the month for which the rent is now demanded?

The Court is of opinion that they were.

All the repairs, under that agreement, were finished in some 8 or 10 days, by the body of workmen put upon the premises by the landlord, and a deduction allowed out of the first month's rent. Whether Mr. Fitz Patrick was bound at law. or not, to repair the leaking roof thereafter, is not here in question. In any view, as proprietor of the subjects, he probably acted very wisely in so doing but, in the opinion of the Court, he had previously and fairly, under the eye of the Defendants themselves, executed all the repairs, during the execution of part of which, (namely: *grosses réparations*) the rent payable was to undergo a diminution.

Therefore, Judgment for Plaintiffs, with costs.

Bail Court.

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT, —COMPÉTENCE,— FONCTIONNAIRES PUBLICS,—MENACES EN VUE D'EXTORSION,— ART. 102 DE L'ORD. No. 35 DE 1852,—ART. 124 ET 227 DU CODE PÉNAL COLONIAL,—STATUT 7 ET 8. G. IV. C. 29. SECTION 8.

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE,—JURISDICTION,—PUBLIC FUNCTIONARIES,—THREATS WITH VIEW TO EXTORT,— ART. 102 OF ORD. No. 35 OF 1852,—ARTS. 124 AND 227 OF THE COLONIAL PENAL CODE,— STATUTE 7 AND 8 G. IV. C. 29. SECTION 8.

Number of Record: 161

POYENOU ANNAPA, Appellant.
Versus.
THE QUEEN, Respondent.

Before:
The Honorable N. G. BESTEL 2nd. P. J.

E. DUPONT,—Of Counsel for Appellant.
E. PASTOR,—Appellant's Attorney.
S. J. DOUGLAS,—Of Counsel for Respondent.
J. BOUCHET,—Respondent's Attorney.

17*th November* 1862.

On this Appeal being called for trial, Dupont, of Counsel for the Appellant, urged upon the consideration of the Court a preliminary objection to the Conviction appealed from.

The objection is a plea to the Jurisdiction of the District Magistrate, grounded upon Art. 102 of the District Magistrate's Ord. (Crim. side) whereby it is enacted that: "No "District Magistrate shall have jurisdiction "in the following matters, as enumerated and "defined in the Penal Code of the Colony, "namely: No. 3, Embezzlement or Extortion "committed by public depositaries or func-"tionaries." Amongst whom, it was contended that the Appellont, as an Inspector of licenses, was to be ranked, and as such not amenable to the Jurisdiction of the District Magistrate.

That an Inspector of Licenses was within the category of the public functionaries referred to, in the above article, is clearly established, it was said, by the definition given by MERLIN of a public functionary, in these words: "FONCTIONNAIRE PUBLIC.—On appelle ainsi tout homme qui exerce une fonction publique. (MERLIN,—*Répertoire de Jurisprudence.*)

If so, the consequence is absence of jurisdiction in the District Magistrate, to adjudicate upon the Criminal Information filed before him; the punishment enacted by

Article 124 against "any functionary, or "public officer, convicted of the Crime of "Extortion or Exaction....." being reclusion, which is an infamous punishment, and not to be awarded but by the Supreme Court on the Crown Side.

That an Inspector of licenses is a public functionary, within the meaning of Article 102 of the District Magistrate's law, was denied by the Crown Counsel, referring to previous cases in this Court. (*Ma'épa vs. The Queen and, Letord vs Spéville.* PISTON'S REPORTS. Vol. 1. P.131 and Vol. 2. P. 129.) It was further contended, by the same Counsel, that assuming him to be so, yet the charge directed against Appellant, as such Inspector of licenses, before the District Magistrate, is not a charge of extortion, but one of a mere threat to accuse a party of a certain misdemeanor with the view of extorting money from him, which offence is not taken out of the Jurisdiction of the District Magistrate.

JUDGMENT.

The criminal Information, in this case, charges the Appellant Poyenou Annapa, of the town of Port Louis, lately an Inspector of licenses, with having, on the 27th April 1862, in the District of Black River, in this Island, criminally *threatened* one Tavoust, to accuse him, the said Tavoust, with having committed the misdemeanor in the Information charged, with the view to extort from the said Tavoust a certain sum of money.

Now, even were we to assume an Inspector of licenses to be a public functionary, in this sense, Annapa, the late Inspector of licenses, is not charged with having committed the offence in his official character, as such Inspector of licenses. The Information, after describing the party charged as late an Inspector of licenses, does not proceed to say that the threat complained of had been made by Poyenou Annapa, he being, then and there, an Inspector of licenses. (See form of Indictment against a constable for extortion. ARCHBOLD. *Criminal Plead.* Page 664. 12th Edition.) wherein we read that: "J. S, then, (and not *late*, as in the Criminal Information before the Court,) being one of the constables, &a., &a., did take, and arrest one J. N. &a. &a. and whilst the said J. N. so remained in his custody, in the said J. S, by color of his said office, did extort, &a."

The qualification of Inspector of licenses is nothing more than an addition, for greater certainty, as to the party charged, which might have been dispensed with, as a non essential.

Further, it is to be noticed that extortion, by public functionaries, is expressly taken out of the Jurisdiction of District Magistrate. But not so the offence charged in the Criminal Information, now before the Court, consisting in a threat to accuse.

Article 124 of our Colonial Penal Code provides against extortion or exaction, on the part of a functionary or public officer, but is perfectly silent as to *threats* which might be made by such functionaries or public officers, with the view of extortion or exaction.

That a *threat* is not equivalent to the deed is evident, and becomes still more so, on referring to the text of Stat. 7 and 8. Geo. 4. C. 29 Section 8, quoted in ARCHBOLD'S *Crim. Plead.* Page 690, (12th Edition.)

In the form given of an Indictment, for *threatening* a man of a crime, the words of the Statute are these: "If any person shall *accuse* or *threaten* to accuse" words not found in Article 124, but inserted in Article 227 of our Colonial Penal Code, wherely it is enacted that: "Whosoever shall falsely accuse, or "*threaten* to accuse, with the view to extort "money, &c., shall be punished by hard labor, "reclusion or imprisonment." Without any distinction as to the rank, degree or office of the person uttering the threat.

The only remedy, against the offence charged against the Appellant, is to be found only in Article 227 of the Penal Code. There being no other legal provision against the offence complained of, when committed by a public functionary or officer, it was absolutely requisite to lay aside the official character of the individual, alleged to have committed the misdemeanor complained of, in order that the offence, of which he is said to have rendered himself guilty, should not be and remain unpunished.

Further, imprisonment being one of the punishments left to the discretion of the Court by Article 227 of the Colonial Penal Code, and the District Magistrate having power to award such imprisonment, I find myself compelled, for the reasons above setforth, to overrule the plea or objection to the jurisdiction of the Court below, and I order that the case be proceeded with on the merits.

Bail Court.

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—LE RECORD DOIT ÉNONCER QUE LES INDIENS INTERROGÉS COMME TÉMOINS SONT MAHOMÉTANS OU HINDOU.

APPEAL FROM DISTRICT MAGISTRATE,— RECORD SHOULD STATE WHETHER INDIANS EXAMINED AS WITNESSES, ARE MAHOMEDANS OR HINDOOS.

Number of Record. 291

AGA MAMODE & ANOR, Appellants.

versus.

ESSAC & ANOR, Respondents.

Before :
The Honorable N. G. BESTEL 2d P. J.

G. B. COLIN,—of Counsel for Appellants
A. J. COLIN,—Appellants' Attorney
J. ROUILLARD,—of Counsel for Respondents
J. PIGNÉGUY,—Respondents' Attorney

17*th October* 1862.

On the trial of this cause, by the Senior District Magistrate of Port Louis, Judgment was given, on the 16th day of May last, adjudging : "that the then Plaintiffs"(and now Respondents,) "do recover against the Defendants" (and now Appellants) "the sum of "$240 or £48, for their debt,and the sum of "£7, 17, 3 for costs of suit, &a."

The then Defendants, feeling themselves aggrieved by the above Decision, have lodged the present Appeal.

Many are the grounds urged in support of their Appeal. But the informal state of the proceedings below will relieve the Court from the necessity of going into the merits or demerits of those reasons.

JUDGMENT.

The general rule, in Civil and Criminal matters, is that every witness, before giving evidence in a Court of law, shall be sworn. However, out of tender regard for the scruples for certain classes of men, such as Quakers, Separatists and Moravians ; the law of England has substituted an affirmation in lieu of the oath required by law.

The same privilege or exception has been introduced in favor of Hindoos and Mahomedans, in our Colonial law, by Ordinance No. 16 of 1856 entitled : "An Ordinance to authorize the substitution of affirmations by Hindoos and Mahometans in lieu of oaths."

The preamble of the Ordinance assigned as the reason for this departure from the usual rule : "the inconvenience that had arisen from "the difficulty of administering oaths to persons of the Hindoo and Mahomedan persuasion in the manner prescribed by the "customs of their several creeds and countries ;" and, in the 1st Article of the Ordinance,it is enacted that : "instead of any oath "now authorized or required by law, every "person of the Hindoo or Mahomedan persuasion,within this Island and its dependencies, shall make affirmation."

This law is clearly an exceptional law, and in order that an indian witness should be permitted, whether on the Civil or Criminal side of the Court, to make an affirmation instead of taking an oath, he must be brought within the exception. This should be apparent, not only to the Judge who tries the case, but to all parties interested, as well as to the appellate jurisdiction, on recourse being had to the exercise of its powers.(Ranglall vs. the Queen. PISTON's *Reports* Vol. I. Page 23.)

If those premises are true, it is clear that the affidavits affirmed before Mr. Magistrate Esnouf, as well as the depositions made under affirmation before the Senior District Magistrate, are defective, nothing appearing on the face of the affidavits or depositions to shew whether or not the several indians witnesses, heard on their affirmation, were Hindoos or Mahomedans.

Unless Hindoos or Mahomedans, the indian witnesses heard in the cause ought to have been sworn, in order that their statements should be evidence. Hence the necessity for the Court above that the proceedings in the District Courts should carefully notice and state the creed of the witness heard on his affirmation.

In the absence of such notice,in the present proceeding,it is impossible for the Court to say how far the statements of the several witnesses are evidence or not, and to come to a sound decision on the respective rights of parties. That neither should suffer from the informality pointed out, the Court remits this cause for a new trial.

Each party to pay its own costs on appeal. Costs incurred below reserved.

Bail Court,

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—VOL.—ABUS DE CONFIANCE—ART. 309 C. P. COLONIAL.

*Le mot ("*EMBEZZLEMENT*") est le terme propre pour qualifier, dans une plainte au Criminel, le vol commis avec abus de confiance.*

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE,— LARCENY, — EMBEZZLEMENT, — ART 309 C. P. COLONIAL.

*The word ("*EMBEZZLEMENT*") is a proper term for expressing a theft by a person in a position of confidence.*

GOONDASAMY, Appellant.
versus.
THE QUEEN Respondent.

Before :
His Honor the CHIEF JUDGE.

G.M.MONCAMP,—Of Counsel for Appellant
T. HERCHENRODER,—Appellant's Attorney.
S. J.DOUGLAS,—Of Counsel for Respondent
J. BOUCHET,—Respondent's Attorney.

14*th November* 1862.

This was an Appeal from a Conviction of the Junior District Magistrate of Port Louis. The parties were accused of embezzling a quantity of tobacco, delivered to them, by the person in whose employment they were, to be made into cigars. The case being established in evidence, to the satisfaction of the Magistrate, the accused were convicted and sentenced, under Article 309, Sec. 2nd, of the Penal Code, to three months' imprisonment and payment of 17s. of costs.

Against the Sentence the present Appeal was entered.

MARTIN MONCAMP for the Appellants :

1.—I contend that the evidence was altogether defective.

2.—The matter charged was properly the subject of a Civil demand, for reparation, not of a Criminal complaint, for punishment; embezzlement entitles the person who has lost his property to compensation.

COURT.—As to the appreciation, by the District Court, of the evidence, we never interfere with the Magistrate's opinion, unless the case is one in which Justice was plainly miscarried. The evidence here was abundant. As to the 2nd point, the word "embezzle" is not used in the Penal Code, but it is perhaps the best term that can be employed for the words of the Code, treating of *vols*, (larceny) when the following words occur: (Article 309) " Si le voleur est un domestique " ou un homme à gages, &a., ou si c'est un " ouvrier, compagnon, ou apprenti, dans la " maison, l'atelier ou le magasin de son Mai- " tre, ou un individu travaillant habituelle- " ment dans l'habitation où il aura volé &a." *Embezzlement* is the theft, or larceny, by persons in a position of confidence, such as those above enumerated.

Appeal dismissed with costs.

Bail Court.

COURTIER JURÉ,—BALANCE DE COMPTE COURANT,—AVANCES D'ENTRECOUPE.

Le Courtier qui fait des avances d'entre coupe, au nom et pour le compte d'un tiers, " qu'il fera connaître quand besoin sera, " peut réclamer, en son nom personnel, la balance de compte qui lui reste due par suite des dites avances.

SWORN BROKER,—BALANCE OF ACCOUNT,—ADVANCES MADE DURING THE ENTRECOUPE.

Circumstances in which it was held that a Sworn Broker could sue in his own name, an alleged balance, said to be due on an account of money advanced to a planter during the entre coupe.

Number of Record: 300

COUVE, Plaintiff
versus.
PIGEOT, Defendant.

Before:
His Honor the CHIEF JUDGE.

G. B. COLIN,—of Counsel for Plaintiff.
W. FINNISS,—Plaintiff's Attorney.
E. PELLEREAU,—of Counsel for Defendant.
E. LAURENT,—Defendant's Attorney.

30*th. September* 1862.

This was a suit, arising out of a very common contract in Mauritius, namely: an engagement by a Sworn Broker, (Couve) to supply money to a Planter, (Pigeot,) during the *entre coupe*; the latter undertaking to consign his sugars to the former for sale, the Broker to account to the Planter for the proceeds, after deduction of the usual commission for his pains and trouble.

In the present agreement, the Broker stated himself to be " *agissant au nom et pour le compte d'un tiers, qu'il fera connaître quand besoin sera.* On balancing accounts, the Broker, the Plaintiff, raised suit against the Planter, the Defendant, for the sum of $250, as the amount to which he stated that he voluntarily reduced his claim, the sum of $161.89 appearing, as he alleged, in the account, as due to him, upon the transaction, for advances, commission and brokerage.

The Defendant denied the Plaintiff's capacity to sue in his own name, as he was acting for another and had undertaken to disclose the name of his employer when called upon.

The learned Judge below gave effect to this plea, and pronounced Judgment in favor of the Defendant, with costs.

JUDGMENT.

THE COURT does not take the same view of this case, as the Judge below. Every thing has, hitherto, gone on, under this contract, in the name solely of Couve and Pigeot. The latter has accepted all the advances, without challenge or injury, *i. e.* he has taken all the advantage he can of the agreement, but when he is called on to pay the alleged balance, he, for the first time, turns round and alleges that Couve, in his own name, cannot act under the contract, and is not entitled to demand that balance, having engaged to disclose his principal when called upon.

The position of a Sworn Broker is, in some

respects, a peculiar one. His relations with his constituents are frequently of a highly confidential nature, indeed, by the law of this Colony, he is severely punishable, in certain cases, if he divulge his employer's name.

In the present case the only undertaking was to make known the name of the third party *quand besoin sera* ; when that becomes necessary, not, as the Respondent argues, when he choses to call upon Couve to do so. No facts have been disclosed here to satisfy the Court that there is any necessity or even expediency, for such a statement. There is no reason to doubt that Couve's discharge will be perfectly sufficient. The balance sued for may turn out to be the mere remuneration due to Couve himself,for his services, which is a debt due to him personally. But even was the balance truly a general one, the Court is of opinion that no relevant statement has been advanced, in the present case, to support the Judgment of the District Magistrate, and that it is an unnecessary straining of the salutary general principle that a party cannot sue by association to say that it must be rigidly enforced in the circumstances occuring here.

The Judgment pronounced is therefore recalled, and the case is remitted to the Court below, to be proceeded with in accordance with the above decision. Costs, in the meantime, reserved. The District Magistrate, on deciding the merits, to have power to dispose of all questions of costs.

Bail Court.

JURISDICTION DU MAGISTRAT DE DISTRICT, —EXÉCUTION DU JUGEMENT D'UNE COUR DE DISTRICT DANS UN AUTRE DISTRICT,—FRAIS.

JURISDICTION OF DISTRICT MAGISTRATE,— EXECUTION OF A JUDGMENT OF DISTRICT COURT IN ANOTHER DISTRICT,—COSTS.

Number of Record : 297

KNOWLES, Appellant.
Versus.
BOUQUILLARD & Ors., Respondents.

Before :
The Honorable N. G. BESTEL 2nd P. J.

J. L. COLIN,—Of Counsel for Appellant.
J. GEO. TESSIER,—Appellant's Attorney.
E. PELLEREAU,—Of Counsel for Respondents.
U. HITIÉ,—Respondents' Attorney.

17*th October* 1862.

In this case, parties are agreed, as to the want of Jurisdiction, on the part of the Magistrate, to adjudicate on the matter at issue, and the only question is that of costs.

On the part of Bouquillard, it was contended that the Respondent ought to bear the costs made in the Court below, that it was his attachment in the hands of the Usher, who executed the warrant obtained by Bouquillard, which had led to the incurring of the costs now complained of.

On the side of Knowles, it was said that the attachment laid by him was necessary to prevent the monies, in the hands of the Usher, from being paid over to Bouquillard, to his prejudice ; and that the subsequent summons, to the attaching and execution creditors, were not the act and deed of Appellant.

JUDGMENT.

On referring to Article 43 of the District Ordinance,(Civil Side) it appears to me that the procedure followed by the District Clerk of Plains Wilhems was, to say the least, altogether useless.

The Article, after having provided for the execution of Judgment of one Court in a foreign Jurisdiction, says: "The last mentioned "Usher, (that is, of the foreign Court,) shall "return, to the Clerk of his Court, what he "shall have done in the execution of such "process, and the said Clerk shall pay over, "to the Clerk of the Court from which the "original warrant shall have originally issued, "all monies received in pursuance of the said "warrant, retaining the fees for the execution "of the process." &a.

On the Interpleader being heard, the Respondent, on the ground of his being no party to that "instance," claimed the proceeds of the sale, as seizing Creditor, whilst the Appellant clearly denied the jurisdiction,acknowledged by Bouquillard, by his motion for a distribution, under Article 656 of the Code of Civil Procedure.

However this was denied, and the Magistrate rejected the attachment of Appellant, thus deciding a point which, the Respondent now admits, was without the Magistrate's jurisdiction.

He should have pleaded to the jurisdiction in order to save the costs incurred.

Judgment is therefore quashed, with costs against Respondent.

Supreme Court.

SAISIE ILLÉGALE DE RUMS,—WARRANT IRRÉGULIER,— DOMMAGES, — ORD. No. 26 DE 1853 ET 3 DE 1861.

ILLEGAL SEIZURE OF RUM, — IRREGULAR WARRANT,—DAMAGES,—ORD. No. 26 OF 1853 AND 3 OF 1861.

Number of Record : 3461.

DUVAL, Plaintiff.
Versus.
STOCK & ANOR, Defendants.

Before:
His Honor the CHIEF JUDGE.

J. L. COLIN,—of Counsel for Plaintiff,
C. LABORDE,—Plaintiff's Attorney.
S. J. DOUGLAS,— of Counsel for Defendants.
J. BOUCHET,—Defendants' Attorney.

14*th November* 1862.

The Plaintiff, a shop-keeper at Flacq, demanded $ 500, by way of damages, from the Defendants, who are Superintendents of distilleries, for having, on the 21st April last, carried off from his premises, a cask of rum of 22½ degrees strenght, and 9 dozen of the same liquor in bottles.

From the evidence, it appeared that the Defendants had taken away the rum from the Plaintiff's shop, on the day in question, as having been illegally removed, not withstanding the remontrance of the Plaintiff, and the exhibition of various permits. One witness deposed that the Defendant Stock stated, at the time, that the rum felt warm to the touch, while a person, asked by Stock to feel it, found it of the ordinary temperature. The Plaintiff's business was interrupted for a time, by the seizure.

A complaint against the Plaintiff, for having the rum unlawfully in his shop, was subsequently brought by Stock, before the District Magistrate, who acquitted the Plaintiff of the charge, but ordered him to pay the costs. The Magistrate declined to give any judgment on the point of the confiscation of the rum, advising the Plaintiff to apply to the Government.

The Plaintiff appealed to this Court, but, apparently, as it was doubtful if any thing could be brought up by appeal, he abandoned that course of procedure, and his appeal was dismissed with Costs.

From certain documents produced, it would appear that the Government were of opinion that the rum was legally confiscated to the Crown ; but an offer was made to restore it to the Plaintiff, on condition that he should previously pay the costs of appeal, and abandon all rights of action in damages.

This, the Plaintiff declined to do, and raised the present claim for reparation.

J. L. COLIN, for Plaintiff: The Defendants, when they came on my premises, had a warrant to take only rum "liable to seizure" or "found in the premises contrary to law." There was none, such in the shop. This we proved before the Magistrate. His Judgment in our favor was a Judgment *in rem.* (*Cook vs. Iholl.* 5 Term Reports, Page 254. PHILLIP'S *Evidence,* 2. 533); and is quite final and conclusive. The Defendants acted altogether unwarrantedly. The proper permits were shewn to them, but they insisted on taking the rum ; they stopped the business of the shop for the day. We have lost our rum, as we declined to be bribed by the Government into an abandonment of our rights, and we have been subjected in costs, loss of time, &c., and we are justly entitled to damages.

DOUGLAS, for the Defendants. The actings of the Defendants were *bona fide*, under a regular Warrant, and the Plaintiff has himself to blame, for all that took place. The Ordinance No. 26 of 1853 (Sections 48 and 55) covers all that the Defendants did. If rum seized under the act is not reclaimed in 10 days, by the latter section, it is forfeited to the Crown. As the Defendants acted legally, in the discharge of their public duties, they are not liable to pay any damages.

THE COURT. By Ordinance No. 3 of 1861, reversing the ordinary rules of law, a person accused of contravening the Revenue laws of the Colony is presumed to be guilty, and is bound to prove his innocence. In the present case, accordingly, the Plaintiff, when accused of infringing these laws, in the matter in question, was not only not proved guilty, but established his innocence of the charge. Nevertheless, without any reason, either assigned or apparent, he was not found entitled to his costs in the Court of the District Magistrate, but costs were given against him, and the Magistrate did not order the restoration of the rum which belonged to him.

It is said that the Plaintiff has himself to blame for the loss of the rum, as it was confiscated to the Government not being claimed by the Plaintiff within 10 days, and Sec. 48 of Ordinance No, 26 of 1853 is relied on, in support of this proposition. In the opinion of the Court the law referred to has no application whatever in the circumstances of the present case.

Let us now look at the position of the Defendants, as called in this suit, to indemnify the Plaintiff. The Judgment of acquittal, by the Magistrate, in favor of the Plaintiff, is, necessarily, a very important step in the claim of damages. Lord Denyon in the case quoted from the Bar, said that: "he conceived that the Judgment of acquittal, in the "Exchequer, which was given in evidence, "being a Judgment in *rem*, was conclusive as "to the question of the illegality of the seizure, and precluded all reasoning upon the "construction of the permit. And however "he might doubt whether that Court had put "a true construction upon the effect of the

" instrument in respect to the time of its " operation, yet he could not help thinking " that the Judgment of acquittal was conclu- " sive as to the illegality of the seizure, which " was the subject of the present action."

The acquittal by the Magistrate, is thus plainly very material for the Plaintiff's case, but the Court is not prepared to say that, in all circumstances, such a Judgment would absolutely sustain a demand in damages. It might be that, altough the accused was able, ultimaly, to justify himself before the Magistrate, there might have existed a case of suspicion such as to have fully warranted the Officers of the Revenue in all they had done. But very little, either by way of justification or extenuation. has been proved by the Defendants. They have called no witnesses, and they have put in no document, excepting a " Search Warrant, " by the Junior District Magistrate of Port Louis, dated 21st March last, and granted in their own oaths that they had cause to suspect, that illicitly removed um was in the Plaintiff's premises.

The Warrant is, *ex facie*, full of irregularities. At the top it is entitled " Search Warrant under Ordinance No. 27 of 1853, and No. 8 of 1861 " the Ordinances referred to in the body of the Warrant are No. 26 of 1853 and No. 8 of 1861, while farther on, the Magistrate states that the acts, in granting the Warrant, under Article 7 of Ordinance No. 8 of 1862. The application for the Warrant is at the instance of both the present Defendants, yet the document, almost throughout, is made to run in the singular number, and it is said the Defendant *hath made oath*, that he hath come to inspect, &c. ; fifty-one words are said to be " struck out from the Warrant as null," when, in point of fact, 54 are deleted. Other irregularities might easily be pointed out on the face of this writing.

But assuming that this warrant were not exposed to any objection, in point of form or substance, it is merely an authority to search the Plaintiffs' premises, and to seize all goods and commodities " liable to seizure and forfeiture." Now no such goods were found. It may be assumed that, at the outset, the Defendants had information (in many cases, such information is not of the most reliable nature) leading them to suspect that something was wrong, and they may have been perfectly justified in searching the premises, but *carrying off* the rum in the circumstances, was a very different thing; when the Defendants found that their suspicions were not supported by evidence, they should have stopped short, and not having done so, but having followed up the proceedings, they acted at their own peril and must take the consequences.

The usual statutory notices, required by law, before raising such a demand in damages against Officers of the Revenue, have been duly given by the Plaintiff, but no tender or offer of indemnification of any sort has been made.

The value of the rum may be taken at £32, 4sh. On the interruption of the Plaintiff's business and loss of time, it is thought that the sum of £20 will be a reasonable compensation. Therefore Judgment is given for the sum of £ 52, 4sh against Defendants, jointly andseverally, with costs of suit. Caption of the body limited to three years.

Bail Court.

APPEL D'UN JUGEMEMT DE MAGISTRAT DE DISTRICT, — PARTIE CORRECTIONNELLE, — VOL,—RECEL,—DÉTENTION D'OBJETS VOLÉS, — ART 40 DU CODE PÉNAL COLONIAL,—ORD No. 35 DE 1852.

Le prévenu, ayant été trouvé, quelques heures après un vol, avec les objets volés en sa possession, a été traduit devant la Cour de District, en vertu de l'Art. 40 *du C. P. C. (Recel,) et son identité ayant été constatée malgré ses dénégations, le Magistrat l'a condamné selon le vœu de la loi.*

Ce jugement a été maintenu par la Cour Suprême ; le prisonnier n'ayant pu justifier, d'une manière satisfaisante, la possession des objets volés.

APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE, — CRIMINAL SIDE,— LARCENY, — " RECEL,"—DETENTION OF STOLEN GOODS,— ART. 40 OF COLONIAL PENAL CODE,—Ord. No. 35 OF 1852.

Where a person was found, a few hours after a Larceny, in possession of the stolen property, and defended himself, when charged under Art. 40 *of the Penal Code, by denying that he was the person, the Magistrate, having found the identity proved, and convicted the prisoner, the Court held that the Conviction was right, prisoner never having given any satisfactory excuse or justification of the possession.*

Number of Record. 163

ARTHUR, Appellant.
versus.
THE QUEEN, Respondent.

Before :
His Honor the CHIEF JUDGE.

G. B. COLIN,—of Counsel for Appellant.
F. MALLET,—Appellant's Attorney.
J. ROUILLARD,—of Counsel for Respondent.
J. BOUCHET,—Respondent's Attorney.
14*th November* 1862.

This was an Appeal from the Court of the Junior District Magistrate of Port Louis, sitting on the Criminal side.

Paul, a domestic servant, was charged with the larceny of a gold watch, and 3 bank notes of £ 1 each, on the twenty fourth September last, and Arthur was charged with being found in the illegal possession of the said watch, on the same day, and refusing to give any satisfactory account for the said illegal possession. Both parties were convicted before the Magistrate and sentenced to three months, imprisonment, and to pay jointly £1—1s—.0d. of costs, or remain in Jail three additional days.

Arthur appealed.

G. B. Colin, for Appellant: There was a complete misapplication of the law here. Article 40 of the Penal Code of the Colony says:

"Those who, knowingly, shall have received, "in whole or in part, or who, without suffi- "cient excuse or justification, shall have been "found to have in their possession, articles "carried off, abstracted, or obtained by "means of a crime or misdemeanor, shall be "held and punished as accomplices in such "crime or misdemeanor."

The law divides itself into two branches: (1.)—Receiving or possessing. (2.)—Knowingly, or without sufficient excuse or justification. There was no proof whatever on the second head. So the case was not within the law and the proceedings are null and void.

J. Rouillard. There was ample evidence, not only to go to the Jury, but to support the conviction.

The Court. The only point in the evidence, admitting of any dispute, was the identity of Arthur, as the person, on the day of the theft, who presented himself at the shop of Mr. Morillon, with a watch having the marks of the watch stolen. The accused denied that he was the person, but the Magistrate held the evidence of identity as quite complete. It is plain that the case is within the law. It is proved that Arthur was in possession of the stolen property a few hours after the theft, and he neither then nor subsequently gave any sufficient excuse or justification.

The Appeal must be dismissed, with costs.

Supreme Court.

Louage d'ouvrage,—Salaire,—Preuve testimoniale,—"Quantum Meruit,"—Preuve Insuffisante,—C. C. Arts 1779 &. 1341.

Contract of hiring labour and Services,—Salary,—Oral proof,—"Quantum Meruit,"—Insufficient proof,—C. C. Arts. 1779 & 1341.

Number of Record. 8302.

BUCKMULLER, Plaintiff.
Versus.
MAUREL, Defendant.

Before:
His Honor the Chief Judge and
The Honorable N. G. Bestel 2nd P. J.

C. M. Campbell,—of Counsel for Plaintiff.
F. Mallet,—Plaintiff's Attorney.
G. B Colin,—of Counsel for Defendant.
P. E. de Chazal,—Defendant's Attorney.

31*st. October* 1862.

Vide Suprà, Page 125.

The demand of the Plaintiff was thus stated in the Plaint.

"Alexandre Buckmuller, a merchant's clerk, "complains against L. A. Maurel, of Pump "street, Port Louis, merchant and general "dealer, for that whereas the said Defendant "is indebted to the said Plaintiff in the sum "of $ 660, being the amount of an account "for eleven months' salary, due to Plaintiff "by Defendant, as clerk in the employ of the "said Defendant, for his trade, at the rate of "sixty Dollars per month, reckoning from 1st "April 1861 to 1st March 1862, and still "due and unpaid."

The Plaintiff farther asked interest on the said sum and the costs of suit.

The evidence produced by the Plaintiff, in support of his demand, was of a very meagre description. One witness said that, in 1861, he had seen the Plaintiff, in the yard of the Defendant superintending some Malabars weighing flour, but that he (the witness) knew nothing more of the relations of parties. A second witness deposed that he knew the Plaintiff, that he saw him going about the Defendant's premises as if in his employment, that, in a conversation with the Defendant, the witness remarked that the Plaintiff's services might be worth $ 40, when the Defendant answered: "he is worth more, I give him $60 per month, and his lodgings." The only other witness for the Plaintiff was, in the course of the year 1861, for one month, in the service of the Defendant, and saw the Plaintiff in the employment of the Defendant, but the witness knew nothing of the arrangement between the Plaintiff and Defendant.

At the close of the Plaintiff's case,

G. B. Colin, for the Defendant, submitted

that there was no case to go to the Court or Jury, that the proof of the employment, as well as of the special contract libelled, had altogether failed. That there was no case of *quantum meruit* raised in the claim, and *Barellier vs. Jollivet*, 26th October 1860, decided by this Court, was referred to.

THE COURT: Although the evidence is very narrow, we do not order the Plaintiff to be at once called to be nonsuited and the Defendant will require to go into his case. Proof closed and Counsel heard.

THE COURT. We are clearly of opinion that the Defendant's evidence is conclusive in his favor. He has established that the Plaintiff himself admitted that the Defendant had been a kind and considerate friend to him, that in a letter, written by the Defendant to Plaintiff, dated in the beginning of April 1861, it was stated:

"Au seul titre d'employé chez moi, je vous "alloue, pour gages, la moitié sur tous les "bénéfices nets que donnera la Boulangerie, "c'est à dire la moitié des bénéfices nets sur "tout ce qui sera cuit dans mes fours, soit "en biscuits, en pains etc. etc."

It was proved that, although the acceptance of this writing, duly subscribed, by the Defendant, had not been formally made by the Plaintiff, in writing, it was acted upon by both parties, and shewn by the Plaintiff to several of the witnesses as the basis of his agreement with the Defendant. It was established that no profits were realized, under the management of the Plaintiff, but a very serious loss; that he never, previous to the raising of the action, made any demand for the now alleged $ 60 per month of salary, but that his understanding of the position of parties as evinced, both by his general conduct and his letters, was entirely opposed to the existence of such any special contract or of any right to made demands on the Defendant for pecuniary remuneration.

In this situation of matters, supposing the present Plaint had disclosed a demand of the nature of a *Quantum meruit*, (of which there is no trace) the Plaintiff could not have succeeded. Judgment for Defendant with costs.

Supreme Court.

DROIT D'ENREGISTREMENT, — CONTRAINTE, — DÉLAI ENTRE LE JUGEMENT ET L'INTRODUCTION DE L'INSTANCE, — PRESCRIPTION, — DROIT PROPORTIONNEL SUR LES MUTATIONS PAR CONTRATS SECRETS.

REGISTRATION, — "CONTRAINTE", — DELAYS BETWEEN ISSUING OF CLAIM AND JUDGMENT, — LIMITATION, — REGISTRATION DUES ON TRANSFERS BY PRIVATE DEEDS.

Number of Record: 7790.

FINNISS, — Receiver of Registration Dues. Plaintiff.

Versus.

CHAUVOT & Wife, — Defendants.

Before:

His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2nd P. J.

J. BOUCHET, — Plaintiff's Attorney,
V. LAVAL, — Defendants' Attorney.

6*th November* 1862.

On the 7th November 1861, the Plaintiff, in his capacity of Receiver of Registration dues, issued against Pierre Chauvot and Joséphine Legoff, his wife, Pierre Aviragnet the elder and Louise Chauvot, his wife, and Eugène Esnouf and Louise Joséphine Ernestine Chupein, his wife, a "contrainte" for the recovery of the sum of £57—10s., due by them for the Registration dues of the instruments in the said "contrainte" setforth.

The above "contrainte" was rendered executory by the Judge, then at Chambers, Sir J.E. Rémono, on the 25th November 1861.

Another "contrainte", bearing the same date as above, was issued by the Plaintiff, in the same official capacity as above, against the said Pierre Chauvot and Josephine Legoff, his wife, for the recovery of the sum of £307—10s., due by them for the Registration dues of the instruments in the said "contrainte" set forth. The 2nd "contrainte" was rendered executory on the same day as the preceeding one, and by the same Judge.

An opposition was made, in the name of Pierre Chauvot and wife, by their Attorney in this Island, Henri Chauvot, against the two exequatur granted.

The grounds of opposition were, in the two "Contraintes:"

1o. The want of Judgment within the time limited by law.

2o. Prescription of two years as to certain dues claimed by the Receiver of Registration dues.

3o. The illegality of certain other dues claimed by the same officer.

The several grounds of opposition have been strongly resisted by the Receiver.

The "Ministere Public" in his oral conclusions in Court, moved the opposition of the Defendants Chauvot and wife be set aside.

JUDGMENT.

In support of its rejection of the 1st ground of opposition, the Court cannot do better than quoting the words of DALLOZ, in his "Répertoire de Législation &a." Vol. 22. *Enregistrement* No. 5776. Page 685, in which words we fully concur, as a sound exposition of our Colonial Registration law, which is exactly the same as the Registration law in France: "En rappelant, sous la précédente section, les termes de l'Article 65, de la loi de Frimaire, qui veulent que les jugemens soient rendus dans les trois mois, au plus tard, à compter de l'introduction des instances, nous avons fait observer cependant qu'aucune peine ne pouvait être attachée à l'infraction de cette disposition, que rend souvent inexécutable la multiplicité des affaires ou leur complication. Cette disposition doit être regardée comme purement réglementaire, de même que celle qui n'accorde que trois décades aux parties pour produire leurs défenses. Cass: 4 Mars 1807; Req: 8 Nov. 1808. Note 2: (Espèces citées sous cette note.) Conf. Req: 19 Mai 1808, Dame Kiebelé, V. No. 2142; Cas: 2 Août 1808 Aff: Hermite, No. 5666. Rep: 18 Juin 1808, Aff: Laguichardière, No. 2053, 5e Espèce. C. C. de Belgique, 13 Février 1833. Affaire Boujean, No. 101: Req. 1er Juillet, 1840. Aff: de Poudeux, No. 4704; Tribunal de la Seine, 28 Avril 1841. aff: Ventenat, V. No. 4697. V. Judgment."

2nd. In reference to the prescription urged, it must be remembered that prescription is a legal penalty against the party neglecting the assertion of a legal right for a shorter or longer time. But that he should be guilty of neglect he must be proved to have knowledge of the existence of such right in his favor, and knowingly and wilfully to have abstained from the assertion of such right. In the present case the Receiver had no notice of his right to certain Registration dues, until the day the Defendant's attorney denounced to him, a few months back only, certain unregistered instruments, the existence of which had been purposely and carefully concealed from the Plaintiff, up to the revelation thereof by the Defendants' Attorney.

On the 3rd objection, the law being here what it is in France, as already observed, the rule laid down in France, must be the same in this island; that Rule is thus stated and in our opinion well stated, by DALLOZ: Vol. 21. V. Engt. No, 2152. Page 445.3: "La vente faite par un individu d'un immeuble dont un autre était propriétaire, fait présumer une mutation qui donne ouverture au droit proportionnel. C. de Cass: 9. Octobre 1810. quoted at same Page. Note 3.)

Again No. 2153:

4o. Lorsque plusieurs particuliers ont acheté un immeuble en commun, la vente, faite par l'un deux, de la totalité de cet immeuble, en son nom personnel, le fait réputer l'acquèreur, par contract secret, des portions appartenant à ses communistes, et le soumet aux droits proportionels résultant de cette mutation. (Cass: 26 Octobre 1812. Req. 29 Juillet 1816. Cour Suprême de Bruxelles. 10 Novembre 1818: See Note 4. P. P. 445, 446. 1re, 2de et 3e espèce.)

The opposition of the said Defendants to the two contraintes above set forth being altogether untenable in law, are therefore set aside as null and void. And the exequatur issued are accordingly maintained.

Costs against the said Defendants.

Supreme Court.

PROPRIÉTAIRE ET LOCATAIRE,—PRIVILÈGE DU BAILLEUR,—MARCHANDISES EN DEPÔT,—DROIT DES TIERS,—C. C. ARTS 1752, 1813 2102,

Le privilège du Bailleur ne s'etend pas sur la propriété des tiers, placée d'après le cours ordinaire des opérations commerciales, dans les magasins loués à un entrepreneur de charroi.

LESSOR & LESSEE,—PRIVILEGE OF THE LESSOR,—GOODS DEPOSITED,—RIGHT OF THIRD PARTIES,—C. C. ART. 1752, 1813, 2102.

A Landlord's right of hypothec does not extend over the property of third parties, placed in the ordinary circulation of trade, within the premises let to a public carrier and warehouseman.

Number of Record:

AMIC, Plaintiff.
versus.
DIORÉ & ANOR, Defendants.

Before:
His Honor the CHIEF JUDGE, and
The Honorable N. G. BESTEL, 2d P. J.

J. L. COLIN,—of Counsel for Plaintiff.
F. ROBERT,—Plaintiff's Attorney.
G. B. COLIN,—of Counsel for Defendants.
E. BOULLÉ,—Defendants' Attorney.

21st November 1862.

Some two years ago, Dioré, the proprietor of a warehouse in Port Louis, let it to Frichot frères, licensed warehousemen and carriers, for the purposes of their trade, at a rent of $ 250 per month.

A few days ago, those tenants suddenly disappeared, and their estates were made Bankrupt. In September last, Amic had deposited in the warehouse, 620 bags of rice, his property, and so marked as to be clearly distin-

guishable. The receipt, by Frichot frères, for the rice, was in the following terms : " Reçu en Magasin, pour compte de M. A. Amic, 620 balles riz." Amic had withdrawn certain of the rice bags, but a large portion of them were in the store, at the date of the Bankruptcy. Amic, as proprietor of the rice, applied in Chambers for an order of delivery. The Assignees in the Bankruptcy had no objection, but the proprietor of the warehouse, Dioré, appeared, and alleging that the rent of the premises was six months in arrear, claimed the right to detain the rice till the rent was paid. Amic denied this right, in the circumstances; hence the present question.

J. L. COLIN, for Amic, depositor of the rice : The Roman Law, from which the Code Civil borrows the Landlord's privilege, gave that right only where the tenant's goods were permanently placed into the premises, *ut ibi perpetuo essent, non temporis causa, L.* 32, *Ff. de Pig. et Hyp.*

This distinction is recognised by the most eminent modern authors. DOMAT, 3.15. GRENIER, "*Hypothecs*" No. 311. TROPLONG. *Hyp.* 1.183, No. 151. SIREY 23.1.4. MERLIN. PRIV. de créances, Lib. 3. section 2.—CASS. 22nd July 1823. — SIREY 23.1.420.—26.1.390. b. No. 8.1307.

The Landlord's privilege extends only over the property of the tenant. The Landlord is a creditor, with the other creditors of the tenant, having a certain right by privilege. His right is a mere tacit pledge, and nothing more. The property of other persons is not affected by this privilege. Article 2102. C. C. shews this clearly, when its words are attended to : "Les créances privilégiées sur certains " meubles sont : 1o. Les loyers et fermages " des immeubles, sur les fruits de la récolte de " l'année, et sur le prix de tout ce qui garnit " la maison louée ou la ferme, et de tout ce " qui sert à l'exploitation de la ferme : savoir, " pour tout ce qui est échu, et pour tout ce " qui est a échoir, si les beaux sont authentiques, ou si, étant sous signatures privées, ils " ont une date certaine, et, dans ces deux " cas, les autres créanciers ont le droit de " relouer la maison ou la ferme, pour le res- " tant du bail, et de faire leur profit des baux " ou fermages, à la charge toutefois de payer " au propriétaire tout ce qui lui serait encore " dû. Et à défaut de baux authentiques, ou " lorsqu'étant sous signatures privées, il n'ont " pas une date certaine, pour une année, à " partir de l'expiration de l'année courante." The words of the law : *tout ce qui garnit la maison* don't apply to the case here, and see Article 1752, which authorises a proprietor to expulse a tenant who does not furnish the house, taken in connection with this article. I refer to the authorities already quoted, and MERLIN. 10. " *Privilèges divers.* " Pages 2. 4. 25, 36.—SIREY 25-: 2 : 331. Endless frauds and delays would be the consequence if the opposite argument were admitted in Mauritius. The importers of Indian rice and English machinery would have their property confiscated to pay the rents of warehouses in which they may have chance, to be deposited. The law, in this department of the Code, carefully protects the rights of property. The article says at the end : " Il " n'est rien innové aux lois et usages du com- " merce, sur la revendication." So the Landlord's right has been held not to extend to the case of goods consigned, and placed in the warehouses, under lease, to the consignee. PARDESSUS, Section 4.5 11. Nos. 1270, 1274.—DURANTON. Vol. 19, Page 110. Nos. 84, 83.—TROPLONG. Hyp. Volume 1. Page 219, No. 173.—SIREY 32: 2: 423—26: 1: 386—23: 1: 320—N. S. 8: 1: 307—48: 2: 71—26: 1: 390.—Even in a case of *Bail à cheptel*, if the Landlord is informed that the property of the moveable is in a third party, he can't seize them for the rent. C. C. 1813. If they are put on the farm, without being intimated, they may be seized, and that, on the principle of ostensible ownership. TROPLONG, *Hypothec*, No. 173. Deposit is a much stronger case, in favor of my argument, than a *cheptel*, where there is a quasi partnership in the articles. Our title here is unimpeachable, we are depositors. There was a mere precarious possession in the hands of the Bankrupt; so, any of the usual arguments, as to presumptions of property, drawn from the fact of possession, are untenable. SIREY 25,2,116.—MARCADE, V. 7, Page 80. No privilege should be extended. DURANTON, V. 19. No. 20.—MERLIN, *Rep.* V. 10, P. 27.

G. B. COLIN, for the Landlord.—The proposition, on the otherside, is that the goods, which have been lodged and sheltered in my warehouse, shall be allowed to be withdrawn without my getting my rent paid. The tenants Frichot are bankrupts. I can receive nothing or very little from them, and if I don't get my rent paid out of the property found in my premises, the Landlord's right, one of the best established and most important in law, will be defeated. It may be that the authorities, in France, are divided on questions similar to the present. The Court will therefore, as it invariably does, follow the course of looking narrowly at the words of the law, and judging for itself. The facts of the present case are simple and undisputed, and Judgment may be given immediately, in this summary form, as well as in a regular action.

What is the law? (Reads Article C. C. 2102.) I admit that I can't go beyond the "*année courante*" for arrears of rent. I only ask six months. But that I am entitled to recover for that time. I cite *Dig. Lib*: 20. Sec. 2. L, 4 and 6.—DURANTON. V. 19, No. 79,87, 92—TROPLONG. 1. No. 156—ZACHARIÆ. 2. Sec. 261—SIREY. 35.—1: 443: 39: 2: 316.—42: 2: 313.—Excepting MARCADÉ, and one decision of the *Cour de Cassation*, the leading French authorities are with me, with PERSIL at their

head; (Com. Article 2102.) They all say that the Landlord's right extends over the moveables generally, brought into the house let. Except MARCADÉ, all the writers shrink from laying down the principle contented for, on the other side, that it is only the moveables which belong to the tenant, that can be seized. If this had been the intention of the framers of the Code, they would have said so in the Article; but the words are opposed to any such view. SIREY 25: 2: 227.—48: 2: 743.—S. V. 4: 2: 172.—20: 1: 490.— 20: 2: 3931.—GRENIER, HYPOTHECS, V. 2, Page 32. TROPLONG, *Louage*, Volume 2, No. 151. 1160. 1535. The leading authority, against us, is SIREY 28: 2: 219; but there, fraud existed; nothing of the kind appear here. DELVINCOUR 2.843.—3. 272.

The argument *ab inconvenienti*, is at least as strong on my side as on the other. Depositors are bound to know what the law is, and to keep in mind the just claims of Landlords. At least, if Amic wished to preserve himself from the hypothec of the proprietor of the magazine, he should have given notice to the latter that the articles did not belong to the tenant, and this, according to some of the French dicisions which, however, are not of the highest class, might have enabled him to revendicate them.

JUDGMENT.

It has been, strongly argued, in this case, that the hypothec of a Landlord, being a *privilège*, and as such not, what is commonly called, a favourite of the law, ought not to be extended by Courts of Justice. In this legal doctrine we entirely concur; but the Landlord's claim, being a well recognised right, existing in almost every legal system, while it is not to be extended by strained inferences or forced analysis, is, unquestionably, entitled to a fair and reasonable application. In France, considerable difference of opinion has arisen on questions similar to the present, but the weight of authority appears to be in opposition to the Landlord's claim. That is clearly the opinion of this Court, and we have arrived at that conclusion mainly on a consideration of the words of the law itself. It does not appear to us that the goods of third parties, deposited for a time, in the ordinary circulation of trade, with a public carrier or warehouseman, are within the words of the law, which give the proprietor of the premises a privilege over the "*prix de tout ce qui garnit la maison.*"

This is one of the cases, according to our view, where the owner of the premises, entering into a lease with a tenant, cannot rely on his right of hypothec, as affording security for the rent.

The Landlord acts with his eyes open. Whatever articles the tenant himself places in the warehouse for carrying on his own proper business, such as packing or weighing machines, with other similar furnishings, undoubtedly fall within the hypothec, but as to articles there, in *transitu*, or merely temporarily deposited and belonging to others, the Landlord has no right to rely on these as affording security for his rent, as their existence is dependent, not on the will of the tenant, but on the pleasure of those members of the public who choses to deal with the lessee and become his customers. The Landlord could not eject the tenant, under Article 1752 C. C., for not having put such articles into the magazine, the latter himself having no command over them. The words of the article are:

"Le locataire qui ne garnit pas la maison
"de meubles suffisants, peut être expulsé, à
"moins qu'il ne donne des sûretés capables
"de répondre du loyer."

This article entirely confirms our opinion, as to the meaning of the word *garnir*. It implies articles over which the tenant has a control.

Other cases, similar to the present, may easily be figured. A landlord who lets his saloon for a fencing school, or his hangar or shed, on a public square, or on a Quay, for protecting carriages and horses against the sun or rain, knows, from the first, that he cannot oblige his tenant to fill his saloon with furniture, or his hangar with carriages & horses. In such cases, the proprietors must secure the payment of their rents, as they best may, by caution, or at least by other means than by looking to a privilege over the articles, the property of third parties, which, in the course of the tenant's business, may be placed, for a time, on the premises. Accordingly, in France, we find that it has been decided that the proprietor's privilege extends over the moveables of third parties, except where the Landlord knows that they are the property of third parties, and do not belong to the tenant himself. (S. 15, 2, 227.) So again, the proprietor's right may extend over goods, consigned to the tenant, where the Landlord had no knowledge of the goods being introduced into the warehouse. (S. 28, 2, 219) but not over goods deposited or consigned by third parties in the warehouse of a Commission Agent, for sale. (S. 26, 1, 390;) and that, whether the Landlord knew to whom the property belonged or not. In SIREY, 54, 1, 852, it was held to be immaterial whether the Landlord's knowledge of the property lying, not in the tenant, but in third parties, is derived from actual special information, or from any other source.

In the present case the premises were let for a business implying and requiring that the goods entering the warehouse were the goods, not of the tenant, but of third parties. The Landlord, therefore, knew perfectly well, from the very first, that the goods were not the property of the tenant. Over such goods, in

such a position of matters, we are of opinion that the Landlord has no claim for his rent.

It may be worthy of remark that, in England, where the law, on this subject, is of an entirely different origin, the result is very much the same. Goods of a principal, in the hand of an auctioner or a carrier, are not destrainable by the Landlord, for the rents due by the factor, auctioneer or carrier, for the premises occupied by them. In Scotland, where the origin of the law, on the subject, is the same as the Colonial, the rules established are thus clearly stated by the late professor Bell, one as the most eminent commercial lawyers of our times: "Goods of third parties, in a "warehouse or inn, are not subject to hypo-"thec; whether they be there on pledge or "deposit, for manufacture, for sale, or in "*transitu*" *Prius*. Sec. 1276.

The motion of Amic, for delivery of the rice, is therefore granted, with costs against Dioré.

Supreme Court.

DEMANDE EN PAIEMENT.—TERMES ÉCHUS,—NOUVEAUX TERMES ÉCHUS DEPUIS LA DEMANDE,—MODIFICATION DE LA DEMANDE.

CLAIM OF PAYMENT.—INSTALMENTS DUE,—NEW INSTALMENTS DUE SINCE THE DATE OF DEMAND,—DECLARATION AMENDED.

Number of Record 8536.

JOMAIN & ORS, Plaintiffs.
versus.
KIESENDAHL, Defendant.

Before:
His Honor the CHIEF JUDGE.

SLADE & BANKS,—Plaintiffs' Attornies
F. VICTOR,—Defendant's Attorney.

3*d July* 1862.

In a suit pending in Court for payment of certain rents in arrear, the Judge at Chambers was moved to allow the conclusions of the Declaration to be amended, so as to embrace the term which had fallen due since the Declaration was served.

THE CHIEF JUDGE said that, after consultation, the Judges were of opinion that it was quite competent, and would of ten save much delay and expense, if after the conclusion for payment of the sums due, at the date of the Declaration, a demand were added for all rents, interests, or other termly payments, whatever they might be claimed by the Plaintiffs which might fall due till Judgment were given in the Case.

Bankruptcy Court.

FAILLITE,—CERTIFICAT DE 2de CLASSE.

BANKRUPTCY,—SECOND CLASS CERTIFICATE.

BANKRUPTCY GODON

Before:
The Honorable N. G. BESTEL 2d P. J,
A. J. COLIN,—Bankrupt's Attorney.

17*th November* 1862.

I have carefully considered this matter.

I find that the main cause of the downfall of the Bankrupt has been caused by the Bankruptcy of one Drouhet, on whose resources for assistance the Bankrupt had too confidently relied, for meeting his engagements, and also from his over speculations in landed estates.

Godon has however assigned to his creditors all he was possessed of. His conduct, before as well as pending and after his Bankruptcy, having been straight forward, he is necessarily entitled to a certificate.

The only point to be considered is the class of certificate to be allowed.

wrtify that Godon's Bankruptcy has not holly arisen from unavoidable losses andn misfortunes, and therefore the certificate to be allowed can be only of the second class, which I hereby award to Godon.

Supreme Court,

COMPETENCE,—COUR SUPRÈME ET COUR DE VICE AMIRAUTÉ,—CHARTES JUDICIAIRES DE 1831 ET 1851.

En matière de dommages, résultant de la collision de deux navires, dans les eaux de l'Ile Maurice, la compétence de la Cour de Vice Amirauté n'est pas exclusive; la cause peut également être portée devant la Cour Suprème de cette Ile.

JURISDICTION,—SUPREME COURT AND VICE ADMIRALTY COURT,—CHARTERS OF JUSTICE OF 1831 AND 1851.

In cases of dammages, from collision of ships within the waters of Mauritius the jurisdiction of the Court of Vice Admiralty is not exclusive those cases may also be brought before the Supreme Civil Court of this Colony.

Number of Record 3581.

LE ROY.—Plaintiff.

Versus.
RAINEY, Defendant.

Before:
His Honor the CHIEF JUDGE and the Honorable N. G. BESTEL, 2nd P. J.

G. B. COLIN,—of Counsel for Plaintiff.
A. J. COLIN,—Plaintiffs' Attorney.
J. L. COLIN,—of Counsel for Defendant.
J. GUIBERT,—Defendant's Attorney.

28th November 1862.

The Plaintiff, in command of the French Ship l'*Union*, pursued the Defendant, Captain of the British Vessel *T. E. Lemon*, for the sum of $ 749.59, the amount of damages alleged to have been sustained by the former ship, while lying at anchor in the harbour of Port Louis, from having been run foul of, by the latter, in coming to anchor, in the same port.

The Defendant contested the jurisdiction of this Court, maintaining that, by the law of the Colony, the only Court competent for trying such a case of collision, within the waters of Mauritius, was the Court of Vice-Admiralty.

J. L. COLIN, *in support of the objection*: Without going, at length, into the old disputes between the Courts of common Law and the Admiralty Courts, in England, as to juridiction, it is enough to remind the Court that, by the ancient Statutes of the Reign of Richard II, cases of the present description were held to be within the bodies of Counties of England, and were not triable in the Admiralty Courts. This is now changed, and by the Statute 3 and 4. Vict. C. 65 section 6, such suits are expressly declared triable before the Courts of Admiralty. By the colonial law, the other Courts, even the highest, are specially declared incompetent, in all cases which may be brought before one local Court of Admiralty. This regulation was found to be necessary, as the Superior Courts of this Colony, at the time when the Vice Admiralty Courts were first established here, in 1814, showed the same jealousy of their maritime rivals, as the Queen's Courts of Common Law in England, did, in ancient times, and hence special legislation was required. By the "Charte de Justice" of 1831, it is expressly declared that: "In all cases in which the Court of Vice "Admiralty of this colony hath jurisdiction, "whether by virtue of any Act of Parliament, "or by virtue of the Commission of the "Judge of the said Court, such juris- "diction shall be exclusive, and it shall "not be competent for the Cour d'Appel "or for the "Tribunal de Première Instance "to hear, decide or take cognizance of any such "case; and that if in any suit or action, or "other proceeding, depending in the said "Court d'Appel or in the said "Tribunal de "Première Instance," it shall be made to "appear that the question, arising in any such "action suit or proceeding, is within the juris- "diction or competeney of the said Court of "Vice Admiralty, then, and in every such "case, the said Tribunal de Première Instance "or the said Cour d'Appel, as the case may "be, shall declare itself incompetent."

Notwithstanding this positive declaration a conflict still existed between the Courts. We find, from a case sent home, in 1842, for the the opinion of Mr. BURGE, an eminent Colonial Lawyer, that some time previously, two conflicting and contradictory "Arrets," or judgments, had been pronounced, by the Supreme Court, on the extent of the Jurisdiction of the Vice Admiralty Court there. By the first of these Judgments, in the case of *Stone vs Martin*, the Court presided by the Chief Judge, maintained the more extensive Jurisdiction of the Court of Vice Admiralty, as defined by the Judge's Commission, and decided that the Vice Admiralty Courts had exclusive cognizance of all questions respecting Charter parties, whilst a second Judgment of the same Supreme Court, in the absence of the Chief Justice, maintained the contrary doctrine, and decided in the case of *The Nimble*, that the Commission of the Judge of the Court of Vice Admiralty of this Colony, as in England, is restrained within the restrictions inposed by the Statute of Richard II, C. 5, although it was argued that this Statute, speaking only of encrouchments on the common law of England, within the bodies of Counties, could not possibly be made to apply to a Colony where there is no County, and where the Common Law of England was not known.

Mr. Burge's opinion was as follows.

I consider that the Vice Admiralty Court of Mauritius, under the order in Council of 13th April 1831, has the sole and exclusive jurisdiction, in every case of which jurisdiction had been given to it, either by the commission of the judge or by any act of parliament, and that the other Courts of the colony are not competent to entertain any such case. (19th May 1842 BRUZEAU. Page 80.)

In the commission of Your Honor the Chief Justice, it will be found that express power is given to deal with cases like the present. The Admiralty Court here is just the high Court of Admiralty of England, sitting by representation.

B. G. COLIN, for Plaintiff: The argument on the other side refutes itself. How can the Vice Admiralty Court of Mauritius arrogate greater powers to itself than the high Court of Admiralty in England? It is said that the Admiralty Court here sits as emanating from the Admiralty in England. So it does, in a certain sense; but no one disputes that it is a

subordinate tribunal, from which appeals lie to the High Court at home. The jurisdiction of the other Courts, in England, is espressly saved by the last clause of the 3rd and 4th Vict, C. 65, which may perhaps make a case like the present competent in the Admiralty Court, and every lawyer knows that cases of collision, like the present, are tried every day in the Common Law Courts of England.

But farther, the clauses of the Charter of 1831 are repealed by our later Charter or Judicial Constitution of 1851 Sec. 14. By that law, it is declared that all laws touching the subject of this Ordinance, contrary to the provisions herein contained, shall be and are hereby repeated.

The Supreme Court has by its constitution, the whole powers of the Queen's Bench, and daily exercises its general as well as its high prerogative powers of issuing the most beneficial writs of Habeas Corpus, Mandamus, Injunctions, &c. The Charter bears :

" Article I.—H. M. Supreme Court of " Civil and Criminal Justice, within the Is- " land of Mauritius and its dependencies, " called the " Cour d'Appel," shall no longer " bear the latter appellation, and its appellate " jurisdiction, except as herein after provided, " shall cease and determine. It shall be called " the Supreme Court of the Colony of Mau- " ritius, shall consist of one Chief Judge and " two or more Puisne Judges, one of whom, " on the first nomination, may be chosen " from amongst the Judges of the dissolved " Court of First Instance, and shall bear on " its seal the Royal arms, with the words " Supreme Court of Mauritius."

" Article 2.—The said Supreme Court shall " have, and is hereby invested with all the pow- " ers, authority and jurisdiction that is pos- " sessed and exercised by Her Majesty's " Court of Queen's Bench in England.

" Article 3.—The said Supreme Court shall " be a Court of Equity, and is hereby invested " with power, authority and jurisdiction to " administer justice, and to do all acts for the " due execution of such equitable jurisdiction, " in all cases where no legal remedy is provi- " ded by the written law of Mauritius.

" Article 4.—The said Supreme Court shall " have, and is hereby invested with, full ori- " ginal jurisdiction, to hear, conduct and pass " decisions in all civil suits, actions, causes " and any matters that may be brought and " be depending before the said Supreme Court " and the Supreme Court and the Judges " thereof shall sit and proceed to, and conduct " and carry on business, in the same manner " as the said Court of Queen's Bench and the " Judges thereof.

" The opinion of Mr. Burge was a mere " private opinion, no doubt of an eminent " lawyer, but only in the case submitted to " him. Now what is the law in England. It is " clearly laid down in Chitty's *Practice*, V. 2. " Page 513.

So Lord Tenterden, in his great work on Shipping. (Serjeant Shee's Edon 1844.) tells us Page 233 : " If the Master or owner of " one of the colliding vessels be unwilling to " bear his own loss, and wish to fix it upon the " other, he may seek his remedy in the Court " of Admiralty or the Courts of common Law. " In both, if he can prove that the Master of " the Defendants' vessel was alone in fault, " and that no want of ordinary skill or " caution, on his own part, contributed to the " misfortune, he will be entitled to recover a " full compensation. "

See also Page 240.

I might have gone to the Court of Vice Admiraulty, if I had chosen, but for reasons at least satisfactory to myself, and which I am not bound to explain to any one, I prefered this Supreme Court.

J. L. Colin replies : I do argue that the jurisdiction in Admiraulty here is higher and more exclusive than in England. Till 1814 we had no Admiratly Court at all. When it was introduced, its jurisdiction was not travelled by the limitations adopted in very ancient times in England. We had no restrictions, as to cases arising within the bodies of counties, or any similar limitations. The Admiralty Courts, in Mauritus, had always juridiction in cases arising in the port and harbours of the Island. If we are obliged to go on, in the Supreme Court, we shall lose the benefit of all those great Maritime English Acts of Parliament, which probably may be held not to be law there. We wish also to be under those rules of the *Jus gentium* which govern the Admiralty Court. The later order in Council dont repeal the Order of 1831. The Supreme Court is limited to " Civil " jurisdiction ; maritime authoritiy is not confered.

JUDGMENT.

This dicussion is not only of some interest, in a historical point of view, but the fixing of the Tribunal, before which the case shall be tried, on its merits, may be of importance to the parties. We beleive that, by a rule of the Courts of Admiralty, differing in this particular from the ordinary law, (which leaves each party to pay his own loss) the amount of damage, resulting from collision without fault on either side, is divided equally between the parties, and the same rule seems to obtain, when both vessels are to blame, and where the individual blame cannot be specially ascertained.

Let us now consider this question of juris-

diction on its merits. It is conceded, by the Plaintiff, and the matter does not admit of doubt, that the suit might have been instituted in the Admiralty Court of the colony. But the contention, on the other side, is that such a suit as the present *must* be carried on, before that tribunal, and that we, in this Court, on the demand being presented to us, are bound at once, to declare ourselves incompetent.

At one period, in the history of the law of Mauritius, and of its tribunals, this argument of the Defendant would probably have been successful. By the charter of Justice of 1831, exclusive jurisdiction was bestowed on the Vice Admiralty Court in cases of this nature. But the state of matters appears to be completely altered by the later changes in our law. This Supreme Court, by the force of those enactments, not only now inherits, if we may be allowed to make use of the expression all the powers and jurisdiction of the abolished "Cour d'Appel," but is endowed with full and original jurisdiction, in all Civil (not Criminal) suits, &c., and is expressly invested with all the powers, authority and jurisdiction of Her Majesty's Court of Queen's Bench in England, and all previous laws contrary to the provisions of the said Order in Council are repealed. In such a position of matters we cannot doubt the jurisdiction of the Court, or decline to entertain this case.

The objections of the Defendant are therefore repelled, with costs.

Bail Court.

APPEL D'UN JUGEMENT DE COUR DE DISTRICT,—TUTELLE,—ARTICLES ACHETÉS POUR COMPTE DES MINEURS.

L'on ne peut poursuivre, sur les biens privés des mineurs, le remboursement des articles achetés pour leur compte par leur tuteur.

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT,—GUARDIANSHIP,—ARTICLES PURCHASED FOR THE ACCOUNT OF MINORS.

The price of goods purchased by a guardian, for the account of his minors, cannot be sued out of the private property of the said minors.

NICOLLE,—Appellant.
versus.
WIDOW BOUCHET,—Respondent.

Before:
The Honorable N. G. BESTEL 2nd P. J.

E. LECLEZIO Junior,—of Counsel for appellant.
A. PISTON,—Appellant's Attorney.
J. L. COLIN,—of Counsel for Respondent.
F. ROBERT,—Respondent's Attorney.

30th September 1862.

In this case the Appellant Nicolle had claimed, before the Senior District Magistrate of Port Louis, from the Respondent Widow Bouchet, the sum of $199.39 for the amount of a promissory note whereof the following is a copy:

"Le dix Juillet prochain fixe je paierai à "M. E. Nicolle ou ordre la somme de cent "quatre vingt dix neuf piastres et trente "neuf centièmes en toutes monnaies métalli- "ques ayant cours dans la colonie. Valeur "reçue en marchandises:

"Port Louis, Maurice, le dix sept janvier mil huit cent soixante et un.

"Bon pour cent quatre vingt dix neuf pias- "tres trente neuf centièmes.

"B. P. $199.39."

"(Signé:) L. V. Bouchet."

The said promissory note was sued, under Ord. No. 15 of 1860, and a summons was issued, accordingly, by the District Court of Port Louis, on the 14 December 1861, and six months after, a return was made by the Usher entrusted with the service of the said Summons, stating that the said Defendant could not be found.

The Plaintiff Nicolle had sued the Defendant, Widow Bouchet above named, in her capacity of legal guardian of one of her infant children, on account of the following letter adressed to Plaintiff.

"Mon cher Monsieur,

"Soyez assez bon je vous prie pour venir "un moment, j'ai besoin de vous voir au sujet "du billet que je vous ai souscrit pour le pia- "no de ma fille; étant un peu souffrante je ne "puis sortir. 28 Août 1861.

"Votre bien dévouée servante,

"(Signé:) L. V. Bouchet."

In virtue of such letter the Appellant Nicolle adressed a Petition to the Senior District Magistrate of Port Louis, praying for leave to attach between the hands of Mr. Sauzier, a notary's clerk, certain monies due by him to the said minor Bouchet.

The said application was granted, and an attachment was lodged, as prayed for, on the 17th December 1861, the said attachment to be dealt with according to the Judgment to

be given by the above Court in the above cause. On the 10th day of May 1862, before any Judgment was given on the merits of such cause, the attaching party Nicolle was summoned by Widow Bouchet to appear, on the 10th day of May 1862, before the District Magistrate of Port Louis, then and there to show cause why the attachment lodged by him, as aforesaid, should not be declared null and void.

Widow Bouchet was summoned by the said Court and at the request of Nicolle, to be present before the said District Court, on the day the said summons, will be returnable, then and there to give her personal answers in the said cause.

On the day of trial the District Magistrate gave the following judgment :

" Mr. J. Rouillard, by attorney Robert, for the Plaintiff.

" Mr. E. Leclezio, by attorney Piston, for " the Defendant.

" Case adjourned from the 10th. instant.

" Mr. Leclezio admitted that Mr. Sauzier, " the Garnishee, had not been summoned, no " Judgment having been given. He could not " go on as he had to get evidence from W. " Bouchet,—prayed for a delay.

" M. Rouillard was stating the reason " why the opposition should be raised, when " Mr Leclezio said he could not go on the " merits this day.

" The Court considers that the opposition " cannot be raised until the Garnishee has " been summoned and heard ; Madame Bou- " chet can at once settle this matter, by ap- " pearing to the summons.

" Case dismissed ; each party paying his own " costs."

On the 6th June following, notwithstanding the foregoing judgment, the attaching party Nicolle was again summoned by Widow Bouchet to appear, on the 13th June 1862, before the District Magistrate of Port Louis, then and there to show cause why the attachment above mentioned should not be declared null and void.

Widow Bouchet was again summoned by the District Court, at the request of Nicolle, to be present on the day of the trial, then and there to give her personal answers in the said cause.

On the day the said summons was returnable, viz: the 13th June 1862, parties having been heard on both sides, the Court declared the attachment null and void with costs against the attaching party.

The following are the notes taken by the Magistrate, in the said last mentioned cause, on the day of the trial.

" District Court of Port Louis.

" Friday, 13th June 1862.

" Widow Bouchet vs. Eugène Nicolle.

" Defendant, in this cause, is called to show " cause why an opposition should not be rai- " sed.

" Mr. Attorney Robert appeared for Plain- " tiff, Mr. Leclézio by Attorney Piston ap- " peared for Defendant, and said that Plaintiff " had no right to come here again, as a Judg- " ment had been given.

" The Court is of opinion that no final " Judgment was pronounced.

" Mr. Robert said that the money stopped " was that of the minors Bouchet ; that a " piano was bought and was partly paid for, " in money, and the balance by a promissory " note, signed by Mad. Bouchet, in her own " name, and the opposition is laid against " her, as guardian of Delphine Bouchet, and " there is another minor. A complete nova- " tion, on the part of Defendant ; that Mrs. " Bouchet could not touch the minors, capital, " but only the interest.

" Mr. Leclezio said, having summoned " Mad. Bouchet, not being able to find her, " and she not attending, he cannot go on, and " that, by Rule 77, the Court could not now " hear the case.

" The Court is of opinion that the objec- " tions raised by Leclezio do not hinder " from going into the merits of the case.

" Note put in, signed in personal name. " Prœcipe put in, made out against Mme. " Bouchet, as guardian of the minor Delphine " Bouchet.

" Opposition placed against her in her afore- " said capacity.

" Mr. Leclezio would have a letter, from " Mrs. Bouchet, put in, to show in what capa- " city the Bill was drawn.

Robert opposed.

" The Court considered that nothing could " alter the signature on the Bill, and declined " to receive it as evidence.

" Letter marked " not received."

" Mr, Leclezio wished to call Mr. Sauzier " as witness to speak as to money paid.

" The Court refused to hear any oral evi- " dence, as the whole case was on documenta- " ry evidence touching the signature of the " Note.

" The Court is of opinion that the guardian, " having signed in her personal name, cannot, " by any after admission shift the debt, off her " shoulders, on those of minor children. Rule " 77 of the District Court applies to the sum- " moning of Garnishees, which cannot be " done until Judgment is obtained ; but Ar- " ticle 41, Ordinance No. 34 of 1852, allows " the District Magistrate to finally adjudicate " or order otherwise.

" Judgment for Plaintiff, with costs; oppo- " sition ordered to be raised after the " delay for appeal has elapsed."

From the last mentioned Judgment, Nicolle appealed to this Court, upon the following reasons :

" 1o. Because the above action, having been " already decided by the said Magistrate, and " *dismissed* by him, on the 21st day of May " last, upon the grounds that the opposition " cannot be raised until garnishee has been " summoned and heard, and until the above " named Plaintiff, Widow Bouchet, has ap- " peared to the summons served upon her, as " a witness in the said cause, there was, in " favor of the said Defendant, a legal presump- " tion, arising from Articles 1350 and 1352 " of the Civil Code, *now in force* in this Co- " lony, and preventing the Plaintiff, in the " above cause, from entering the above action " before the said District Court, until the " Garnishee may be summoned in due course " of law, and the said Widow Bouchet be " present in Court, to give evidence in the " above cause, which was not the fact.

" 2o. Because the attachement which, by " the said judgement of the 13th instant, " has been declared null and void, having " been lodged with the Magistrate's authori- " zation, after satisfactory *prima facie* eviden- " ce, could not, according to law, be set a- " side and anulled, before Judgment having " been given on the merits of the principal " claim, viz : the claim made by the said Eug. " Nicolle to the said Widow Bouchet, of the " sum of 199 dollars and 39, ¢. amount of a " Promissory note, and inscribed in the Record " of the said District Court under No. 3488 " of 61.

" 3o. Because the said Widow Bouchet was " called as a witness, in the above cause, and " did not attend the Court on the day fixed " for the hearing thereof, viz : on the 13th. " June instant, although duly summoned.

" 4o. Because the said District Magistrate " has refused to receive as evidence, in the " above cause, a letter, written and signed " by the said Widow Bouchet, and explaining " for what motives and in what capacity she " had subscribed the said promissory note " above mentioned.

" 5o. Because the said District Magistrate " has refused to hear, as a witness, in the " above cause, Théodore Sauzier of Church " street, Port Louis, Notary's clerk, who had " been summoned and was present in Court, " to give evidence in the said cause, on the " day of the hearing thereof, viz : on the 13th. " June instant.

" 6o. Because the said District Magistrate has given a Judgment which cannot be supported in law."

The Appelant applied, within the delay prescribed by law, to the Registry of the District Court and, upon taxation, paid for the office copy of the record to be sent in such cases by the said Registry to the Judges of the Supreme Court.

Some time after, the Appellant being informed that the office copy sent to the Judges of the Supreme Court was only that of the last Judgment, and the proceedings connected thereto, applied again to the District Court of Port Louis, for an office copy of the first above mentioned Judgment of the 21st May, and of the proceedings connected thereto, and tendered the same in evidence to Respondent,

On the day of the trial E. Leclezio Jr., for Appellant, contended, as morefully described in the above mentioned reasons of Appeal, that the Judgment of the District Court of Port Louis, of the 13th June, was to be quashed, in so far as the question therein decided had already been disposed of, on the 21st day of May ; and in support of his allegations counsel tendered to the Magistrate the office copy of the above mentioned Judgment of the 21st May 1862. As to the merits of the case Counsel for Appellant stated that he would not go into them at full length, in so far as the Magistrate below had refused to take in consideration the witnesses and documentary evidence adduced by Nicolle to prove in what capacity and for what purposes Widow Bouchet had subscribed the promissory note claimed by the Appellant.

That the only question now to be decided, by the Court, was to know whether he had or had not the right to adduce witnesses and documentary evidence, and to call Widow Bouchet on her personal interrogatories to prove the consideration of the said Promissory note, especially in presence of the letter addressed by Widow Bouchet to Nicolle in this cause. (quoted above.)

J. L. Colin, of Counsel for Respondent, contended : That there was no *res judicata*, as the first Judgment was not a final one; that there was no proof, in the Record, of the existence of such Judgment.

That, as to the merits of the case, the judgment of the Magistrate below was a right one, and that minors were not to be answerable, for the debts contracted by their guardian.

Leclézio, in reply, quoted Art 1312 of the Civ. Code : " Lorsque les mineurs, les interdits ou les femmes mariées sont admis, en ces qualités, à se faire restituer contre leurs engagements, le remboursement de ce qui aurait été, en conséquence de ces engagements, payé pendant la minorité, l'interdiction ou le mariage, ne peut en être exigé, à moins qu'il ne soit prouvé que ce qui a été payé a *tourné à leur profit.*" Appellant added that he was ready to prove, in this case, that the piano purchased by Widow Bouchet, for her daughter, had benefited to the minor whose money had been attached.

That if such was the law, as to contracts entered into by minors, *a fortiori* this law was to be applied to them, when the contract was passed in their name by the guardian, especially when such guardian was a legal one, (father or mother) who, by Art 454 of the Civ. Code are not limited, as the other guardians, within a fixed annual expence, usually established by the family Council. Quoted Dalloz : 1835 : 1 : 336, and Sirey. 41 : II : 515, reporting a judgment of the Court of Toulouse, whereby : "Un instituteur a action, " non seulement contre le père, mais en cas " d'insolvabilité du père, contre l'enfant, pour " le remboursement des frais d'éducation."

Counsel for Appellant further contended that the main question now at issue, before this Court, was the illegality of the Judgment given, in a question which, some days previous, had been decided in a quite opposite sense by the same Magistrate in the same case. That a *dismissal* was a final Judgment of a case. That the Record, before the Judge, was to be composed only of the Judgment appealed from, and that the Appellant was perfectly entitled to tender as evidence an office copy of the first Judgment to prove the *res judicata*. That if, by law, such first Judgment was also to form part of the Record sent to the Judges of Appeal, the District Court only was in fault, as the Appelant, applying there, had only to pay the fees, claimed by the Registrar, and taxed by him, for an office copy of " the Record required for the Appeal. " That such practice of forwarding to the Judges of appeal the Record of the Judgment appealed from, was prescribed by law, to the District Magistrate, not to the Appellant, who has only to pay, in due time, the expenses claimed from him by the District Clerk for such copy.

JUDGMENT.

This is an Appeal from a Judgment of the Senior District Magistrate of Port Louis, of the 13th June last, adjudging that the attachment lodged in the hands of Théodore Sauzier, on the 17th day of December 1861, at the request and on behalf of Eugène Nicolle, the then Defendant (and now Appellant,) be raised, and that the said Defendant, (now Appellant,) do pay the costs, &c.

The facts of the case are these : Mrs. Widow Bouchet had given a Bill, for $ 199.39 c., in payment of " marchandises." To secure payment of the Bill, signed by her, in her own personal name, the Appellant presented a petition to the Magistrate, for leave to attach, in the hands of one Théodore Sauzier, certain funds belonging to the minors Bouchet, on the allegation that the article purchased by Mrs. Widow Bouchet, was a Piano for her infant daughter.

Whether or not the bill was exhibited to the Magistrate does not appear. The leave prayed for was granted and the funds of her minor children, in the hands of T. Sauzier, were accordingly attached. Of this attachment Mrs. Widow Bouchet, in her capacity of legal guardian of her infant children, demanded the removal, as null and void to all intents and purposes. Whereupon the above Judgment was given.

The now Appellant, dissatisfied with that Judgment, has appealed from the same. On the argument, it was urged, that the above cause had already been decided by the Magistrate, who had dismissed the action ; of which decision however there is no evidence in the Record; and 2dly. that he had refused admitting in evidence a letter of Mrs. Bouchet, to the Defendant, explaining the consideration for which her personal bill had been given.

These were the two grounds dwelt upon. I have carefully considered the matter, and I cannot but say that it was impossible that the Magistrate should have come to another conclusion, but the one arrived at by him. He has removed an attachment which he would certainly not have allowed had the petition, presented to him, disclosed the true state of facts brought to light at the trial.

The Appeal must therefore be dismissed with costs.

The other grounds of Appeal having been passed over in silence, I have necessarily abstained from saying any thing as to their merits or demerits.

Supreme Court,

INSTALLATION OF THE HONORABLE G. B. COLIN, AS SECOND PUISNE JUDGE.

On Monday, the 1st December 1862, at 11 o'clock A. M. His Honor the CHIEF JUSTICE, the Honorable N. G. BESTEL, first Puisne Judge and the Honorable G. B. COLIN appeared in Court, with the Honorable W. G. DICKSON, H. M. Procureur and Advocate General.

His Honor the CHIEF Justice and the Honorable first Puisne Judge occupied the Bench, and the Honorable G. B. COLIN sat on the left of the Honorable Procureur and Advocate General.

All the members of both branches of the legal profession, and a great number of persons of all ranks of society were in attendance, giving thereby a proof of the great satisfaction which the nomination of a fellow countryman afforded to the Mauritius public, and also, a mark of sympathy to the new Judge.

The Judges having taken the Bench, His Honor the Chief Justice opened the proceedings by the following address :

Mr. Justice BESTEL, Mr. Procureur General, Mr. Kœnig and Gentlemen,—We have met here, this morning, as you know, for the purpose of receiving Our Most Gracious Majesty's Commission appointing a distinguished member of the Bar, Mr. Gustave COLIN, to a seat on this Bench, vacant by the resignation of a time-honoured and much respected Judge, SIR J. E. REMONO.

On such occasions of public changes,—indeed, we may say the same of almost all the ever-occurring shiftings of the scene in this world of ours,—our feelings are necessarily of a mixed and checquered nature; while to-day, on the one hand, we derive pleasure and gratification from seeing a friend reaping the rewards which he so well deserves, on the other, those emotions are mingled with the sad regrets and sorrow inseparable from the recollection that, in this place, and on this Bench, SIR E. REMONO will be seen no more.

Good taste and good feelings, gentlemen, (and I believe the two are ever inseparable) dictate to us the duty of remembering and rendering homage to the virtues of our seniors who have preceded us in the race of life, before we notice the merits of our contemporary, or our younger brethren who appear as their successors. May I, then, in the first place, say a word of my most respected friend who has just left us.

By the retirement of SIR E. REMONO, Her Majesty loses the services of one of the most loyal and faithful of Her Judges and subjects, and the public of Mauritius are deprived of the presence, in their Supreme Court of Justice, of a most able, patient, impartial and conscientious Judge. His great, I may say profound knowledge of Law, particularly in the mixed form in which it is administered in this island, was only equalled by his singular natural capacity and knowledge, almost intuitive, of men and manners, which enabled him to appreciate so often and so rapidly the true position of parties in litigation before him, to support the claims of the honest and conscientious and to repel the pretensions of the artful and designing. Who of us, who have so often seen the administration of Justice in his hands, shall ever forget the contemptuous energy with which he rejected the demands of the unprincipled and dishonest suitor ?

I am sure it is the heartfelt desire, not only of the whole professional body of Mauritius, but of the far wider circle of his friends in this and the neighbouring Islands, and in England and France, that his intellect, perfectly unclouded as it is, may be long continued to him bright and unimpaired, and that his bodily infirmities, which have forced his resignation upon him, may be so mitigated by a good Providence that he may long enjoy, in the bosom of an affectionate family and society of his numerous friends, one of the few solid rewards which this life affords : the consolation derived from the reflection of a life well spent in the performance of duty with the approbation of our follow citizens.

May I now, for a moment, turn to another aspect of the proceedings of the day, and say a word of my friend, Mr. COLIN. I may, I believe, without any breach of propriety, be allowed to express what, I am sure, is the universal feeling of the Colony, that among the many able and accomplished Advocates, at the Bar of Mauritius, from whom the new Judge might have been selected, Her Majesty and Her Advisers could not have made a better, a more acceptable or popular choice. His great natural abilities, carefully cultivated by a thorough education both in Mauritius and in the wider fields of Europe, soon enabled him to take a high place in his profession ; and the uncommon assiduity, industry and ability which he brought to bear upon the mass of business with which he was speedily entrusted, soon gave him the fullest confidence of the host of clients which surrounded him and placed him in the foremost rank in his profession. His past success gives us the surest augury and presage that, in the new sphere to which he is now called, he will be equally eminent and will very soon secure what is the desire and pride of every Judge to strive after and obtain : the good opinion and confidence of the enlightened members of the community among whom it is his lot to serve. (Loud applause.)

The Hon. Procureur General now tendered the Commission of Mr. JUSTICE COLIN to the

Registrar of the Court, with the request that it be read. This being done, His Honor took his seat on the Bench after having been warmly congratulated by His Honor the Chief Justice and His Honor Mr. Justice Bestel.

The Honorable Procureur General then rose and said :

Your Honors,

With leave of the Court, I rise to express, in a few words, to Mr. Justice Colin, my sincere congratulations on his well merited promotion to the high office he has this day entered on. These congratulations, I take leave to present, not merely on behalf of myself personally, but in the name of the Government, which I have the honor to represent, and, I believe I may add, on behalf of the legal profession and the public generally.

After the eulogium which Your Honor has pronounced on my learned friend, now Mr. Justice Colin, any words of praise from me, would he quite unnecessary. That gentleman is far too well known, within these walls, all who hear me are too well conversant with his eminent qualifications, to render any eulogium from me at all needful. I shall therefore only say, in a word, that I bear willingly testimony to the learning, the talent, the stores of experience and knowledge, which have won for him his high position, and that too at a time of life when few men attain judicial honors ; and I doubt not that, with his high qualifications, and the vigour of a man, still in the prime of life, he has before him an eminent judicial career.

But I would not do Justice to my own feelings, if I did not, in a few words, bear my humble testimony to the merits of the upright and venerable Judge, the perfect gentleman, the sincere and valued friend, whose place Mr. Justice Colin now fills. It has been Sir Edouard Remono's happy lot, during a long judicial career, to have won the confidence and the esteem of all, and the veneration and love of very many friends. And it is no disparagement to his very able successor to say that we shall long miss the venerated form of the man we esteen so highly as a Judge and love so dearly as a friend. I join most heartily with Your Honors in hoping that Sir E. Remono may find, in his retirement, the years of rest and peace and happiness to which his long period of judical labours so justly entitles him.

The Hon. H. Kœnig :

Le Barreau ne peut rester indifférent et silencieux dans cette circonstance, et si mes confrères veulent bien me le permettre, je dirai aussi quelque mots.

Après les discours que vous venez d'entendre de Son Honneur le Chef Juge et de l'Honorable Procureur Général, il me reste peu de chose à dire ; cependant je sens le besoin d'ajouter quelques paroles.

C'est toujours un jour solennel que celui de l'installation d'un nouveau Magistrat. Le Barreau, les Justiciables sont avides de le connaître. Ils l'accueillent avec l'espoir qu'il sera à la hauteur des importantes fonctions qu'il est appelé à remplir.

C'est un jour heureux quand ce Magistrat est déjà connu, et un plus beau jour encore quand c'est un des nôtres, un enfant du pays, que ses talents, son mérite et son caractère ont rendu digne d'être appelé à ce poste élevé.

Nous saluons donc avec bonheur la présence de M. Gustave Colin sur un des sièges de la Cour. Nous l'en félicitons sincèrement ; nous en félicitons ses collègues ; nous en félicitons les justiciables.

Sa nomination est un acte de Justice que nous savons apprecier ; elle est d'un heureux augure. Nous espérons qu'on reconnaîtra qu'on peut trouver parmi les nôtres des sujets dignes d'être appelés aux plus hautes fonctions. M. Colin, en partageant les travaux de ses collègues, en leur apportant l'assistance de ses lumières et de son expérience, contribuera à cimenter et à resserrer davantage, s'il est possible, l'union qui existe entre la Magistrature, le Parquet et le Barreau, entre lesquels nous nous plaisons à le reconnaître, il n'a jamais existé un échange plus complet et plus sincère de courtoisie, de déférence et d'égards.

Cette union, cette réciprocité de sentiments et de procédés sont la première condition d'une bonne administration de la Justice.

M. Colin succède à un Magistrat qui a aussi toutes nos sympathies, et nous ne saluerons pas la venue de l'un sans payer un juste tribut à la retraite de l'autre. Après une carrière longue et honorable, le repos devient nécessaire à l'homme, et quand il quitte les travaux de la vie publique après l'avoir dignement remplie, il doit éprouver dans sa retraite une bien grande satisfaction lorsqu'il y porte, comme Sir Edouard Rémono, l'affection et les sympathies de ceux dont il a été longtemps le collègue, de ceux dont il fut, longtemps aussi, le confrère et de la société toute entière. (Applaudissemens.)

M. Colin marchera sur ses traces ; il méritera comme lui, l'estime et le respect de ses concitoyens, et si nous éprouvons un regret bien sincère de ne plus voir Sir Edouard Remono sur le siège qu'il a si longtemps, et si bien occupé, c'est une grande satisfaction pour nous de voir qu'il sera dignement remplacé. (Applaudissements prolongés.)

Mr. Justice Colin, in rising to return thanks

spoke under the influence of deep emotion. His Honor spoke as follows:—

Allow me to return you my heartfelt thanks for the kindness that has prompted so courteous, so generous an expression of your sympathies and wishes. Called by His Excellency's choice to replace, on the Judicial Bench, one so dear to us all, one whose countenance ever beamed with a smile of benevolence and kindness, whose learning and long experience will not soon be forgotten, and who so well knew and so constantly used the gentle word that turneth away wrath, I feel more vividly the difficulty of my task and I entertain a more lively sense of the feelings with which I have been greeted and which cheer me on to meet that task manfully.

Other duties are now before me; instead of the strong emotions of the advocate, the calm sober discretion of the Judge; instead of the advocate's duty calling on him to devote, with truthfulness and honesty, all his energies to the service of one of two conflicting parties, the more solemn duty now arises for me to concentrate all the powers of my understanding to the perception of right, to the detection of wrong, to the defeat of trickery and chicanery; here now must be the ever present, all pervading will to mould my thoughts and guide my intellect to that pure and lofty goal, justice between man and man, justice as a labour of love, justice administered with promptitude, with courage, that courage

> Whose ends are honesty and public good
> For without these it is not understood.

That duty I have the will, God grant I may have the power to perform.

Yes, I am alive to the high moral responsibility that attaches to my functions, and which rigidly and zealously shall engross my attention, as it will captivate my mind. But Mr. Kœnig, my dear old master and friend, and you gentlemen of the Bar, let me tell you that although removed from the ranks of that profession of which I have for many years been an active member, my hand shall forget its cunning before I can forget the scenes of our well foughten fights, of the labor and toils I have shared with you, our alternate triumphs and deceptions, our constant friendship, our rivalries without envy, our jealousies even, but without littleness, our mutual esteem, our mutual confidence. Without that esteem and confidence, abler and better men than myself, and I see many before me, might have failed; I feel and never can forget that in my hours of sadness, when the heart faints and the soul desponds, it has sustained and cheered me on my way. To that esteem and to that confidence, as well as to the bright example, set me by those by whose side I shall have the honor of sitting, by my predecessor who has just retired full of years and honor, do I fervently look for support in the discharge of the office which His Excellency has conferred on me. Mr. Kœnig, my revered master, my dear old friend, and you all companions of my youth and friends of my mature manhood, from the bottom of my heart, I thank you, God bless you all! (Loud applause.)

The Court then adjourned and the members of the Bar proceeded in deputation to the residence of Sir E. Remono to express their deep regret at his retirement from the Bench. The Hon. Mr. Kœnig was their spokesman and Sir Edward returned thanks in a very feeling address, which ended as follow:

"Il est bien flatteur pour moi de me trouver, en ce moment, entouré des membres du Barreau, avec lesquels j'ai passé 32 ans de mon existence, et qui m'ont donné la satisfaction des rapports les plus agréables. J'ai pu être intéressé dans mon amour propre par la situation que j'occupais, mais, je le dis avec sincérité, c'est mon cœur qui en a été profondément touché. Comment ne serait-ce pas, lorsque pendant un si long temps d'exercice, pas le moindre nuage ne s'est elevé entre nous?

Je ne vous quitte pas, mes amis, ma santé me force à m'éloigner, mais le plus vif intérêt continuera à m'attacher à vos succès, à la considération que le public déversera sur vous et au bonheur que vous aurez honorablement acquis.

Permettez-moi de le dire, vous avez en moi un véritable ami."

At three P. M., the Judges of the Court also waited on Sir Edward for the expression of their sympathy and regret at his resignation and at the cause which had brought it about.

Bail Court.

Cour Supreme,—Bail Court,—Compétence,—Action principale.

La Cour Supreme a compétence pour entendre une action principale concernant la validité de titres en vertu desquels des poursuites ont été exercées davant le Master de la Cour Suprême.

Lorsque le montant du titre contesté n'excède pas £100, *le Bail Court est la Cour competente pour juger la question: Secùs lorsque le montant de ce titre excède* £100.

Supreme Court,—Bail Court,—Jurisdiction,—Principal Claim.

The Supreme Court has power and is the proper tribunal to try substantive actions, touching the validity of titles and deeds in virtue of which real proceedings, have been taken before the Master of the Supreme Court.

When the amount at issue does not exceed £100 the Bail Court will try the issue; Secùs if it exceeds £100.

Number of Record:

WIDOW LAFLEUR & Ors. Plaintiffs.
versus.
BASTIEN, Defendant.

Before:
The Honorable G. B. Colin, 2d P. J.

J. Rouillard,—of Counsel for Plaintiffs.
J. Pigneguy,—Plaintiff's Attorney.
E. Dupont,—of Counsel for Defendant.
U. Hitié,—Defendant's Attorney.

12*th. December* 1862.

In this case, the Plaintiffs, by Plaint with summons, applied to the Bail Court, to set aside certain proceedings, taken against them, before the Master of the Court, at the instance of the Defendant, and to declare that the title, under which such proceedings have been taken, has no force, in as much as it is barred by the law of limitation. The proceedings are not challenged on account of informality, nor has any incidental question arisen; the issue or the merits is the validity or non validity of the Defendant's title.

When the cause was called for trial, on Thursday, December 11th 1862, Dupont, for Defendants, took a preliminary objection to the jurisdiction of the Bail Court. The sum at stake is but $72 and if interest be added, the total amount does not exceed $ 232,50. If Bastien had claimed that sum he would have brought his action before the District Court, and the converse of the proposition ought to be upheld; if the Plaintiffs say they are to be released from the liability, the District Court is the proper tribunal where the release can be obtained. Furthermore, it is argued, by Section 142 of the Rules of Court, if the proceedings taken are to be challenged, it must be before that Officer, not before the Court. At all events if the Supreme Court may be applied to, there is, it is urged, no precedent to show that that branch of it, called the Bail Court, can be appealed to; why not proceed directly before the Supreme Court itself?

It seems to me that this question is free from difficulty. There is no doubt that if the proceedings, taken before the Master, were argued to be null and void, on grounds connected with the proceedings themselves, if one of the many incidental questions, that may arise in the course of such proceedings, was to be found in this case, the Master would be the proper Officer to whom parties should apply to be set aright. But what we have to deal with here is not an incident, it is a substantive action to the effect of obtaining a decree, declaring a title to be of no effect because barred by limitation, the proceedings will stand or drop according to the view taken by the Court of the real issue, and that issue really is this: Is the title good or bad? Does the law of limitation apply here? Whether or not the Master, if seized with such a substantive action, would have entertained it, or would rather have at once referred the question to the proper Civil Tribunal, is another question; but that the Court can be directly asked to adjudicate upon a claim of this nature, seems to me both, clear in principle, and in practice sound.

Now, that the District Magistrate is not the Judge who can try the cause, is evident. The proceedings before the Master, which must be set aside if the title is declared to be of no effect, are proceedings which, at the instance of the Defendant himself, have issued out of the Supreme Court, in obedience to Sections 119 and following of the additional Rules of Court.

It is not attempted to say that a District Magistrate has power to stay or annul process issued out of the Supreme Court, and would not such Magistrate pratically annul such process, if he sets aside the title under which it not only must issue but has been made to issue? If he did not practically annul such process, of what benefit would be, to the parties, a Judgment which could not carry, along with it the legal force without which it is almost worthless? At any rate Defendant is stopped from urging that the Supreme Court has no power, in this matter, by the very fact that he has acted under benefit of the Rules applying to the Supreme Court, and has adopted and followed process issuable only from that Court.

A law question remains; if the Plaintiffs had the right to bring their action, for the purposes above mentioned, before the Court, had they the right to bring it before that branch of it called the Bail Court?

The Bail Court is, in fact, part of the Supreme Court; by its institution, it is intended to try cases of lesser importance than those which are disposed of by the Judges upstairs. Now, in this case, the amount at stake is stated, by the Defendant himself, to be below £100, principal and interest; the proceedings taken by the Defendant are of the summary nature which points out directly the more summary branch of the Court as that which ought to be seized with the investigation of the value of the title under which they have been taken. In principle the Bail Court

seems evidently to be the proper side of the Supreme Court to try this matter, and the *Onus probandi* that the practice is or ought to be otherwise, is on the Defendant, and this he do not shew, either by precedent or analogy.

I am therefore of opinion that the Bail Court has jurisdiction to enter into the merits of this cause, and I accordingly overrule the objection ; I direct that the parties do proceed on the merits, and I give th e costs of the day against the Defendant; all other questions of costs to follow the event.

Supreme Court.

PROPRIÉTÉ SUCRIÈRE,—ADMINISTATION,—COMPTES,— PROCÉDURE,— AMENDEMENTS,—ART. 73 DES RÈGLEMENTS DE LA COUR.

Les amendements que l'une des parties au procès est autorisée a introduire dans sa procédure, avec la sanction de la Cour, doivent porter sur le point en litige que la Cour est déjà appelée à décider.

SUGAR ESTATE,— ADMINISTRATION,— ACCOUNTS,— PROCEDURE,--AMENDMENTS,--RULE OF COURT No. 73.

The amendments which a suitor may be authorized, by the Court, to insert into his pleadings, must be so framed as to determine, in the existing suit, the real question in controvercy between the parties.

Number of Record : 8574

LORTAN, Plaintiff.
Versus.
SIR J. E. RÉMONO & Ors., Defendants.

Before :
His Honor THE CHIEF JUDGE and
The Honorable N. G. BESTEL, 2d. P. J.

S. J. DOUGLAS,—Of Counsel for Plaintiff.
J. PIGNEGUY,—Plaintiff's Attorney.
G. B. COLIN,—Of Counsel for Defendants.
A. J. COLIN,—Defendants' Attorney.

17th October and 23rd December 1862.

(*Vide Vol.* 1. *Page* 150.)

This action was in sequel of the case between the same parties, reported of date 16th October 1861. (PISTON V. I. Page 150.) In the former suit, the Court found that an important interest, (namely one fourth) in the Estate *Bel Ombre*, was conferred on the Plaintif, as soon as the clearance of the Estate had been effected, and with the view of extricating the rights of parties, the Court, by interlocutor of 16th October 1861, ordered as follows :

"That withim one calendar month, from "this date, (October 16th 1861), the Defen- "dants do lodge, with the Registrar of this "Court, an account of the income and expen- "diture of the Estate *Bel Ombre*, from the "date of the purchase in 1850, till 3rd April "last 1861, balanced annually as on 3rd April, "said state to shew how the money, necessa- "ry at the outset for commencing the wor- "king and cultivation of the Estate, was "supplied; how the annual profits, when any, "were applied, and annual losses, when any, "were made good ; how and when the sale "price was paid off, (if this has been done,) "which, of their original mortgages. (if any,) "were paid off, and by whom; what mortga- "ges, (if any,) still remain on the Estate, "with any other information which the De- "fendants may deem material at this state of "the case."

The Defendants duly obtempered this order. From the account so given in, it appeared that, at the date of 30th April 1861, an alleged balance of $ 60,554.15 still stood against the Estate.

The present action was raised in July last. The Plaintiff, in his Declaration, narrating the act under private signatures of 6th October 1850, between the late Jean Staub and Sir J. E. Rémono, (the terms of which are referred to in the report of the proceedings in the first suit), and the apparent result of the accounts, as given in by the Defendants, now sets forth :

"That the said alleged accounts have been "made and drawn up contrary to the terms "of the aforesaid Judgment, and contain "numerous errors and false entries, and the "same are in every respect altogether infor- "mal, unfair, unreasonable and erroneous, "and, as such, are repudiated by the said "Plaintiff.

"That, from the inspection of these afore- "said several alleged accounts, it clearly "appears that the management and adminis- "tration of the "*Bel Ombre*" Estate, from "and since the death of Jean Staub, has been "altogether ruinous to the Estate aforesaid, "and calculated to impede the liquidation "thereof.

"That the Defendant Eugène Roget de "Belloguet, an utter stranger to agricultural "matters,and who had hardly been one month "in this Colony, without the priority and "consent of the said Plaintiff, took the man- "agement and administration of the said "estate *Bel Ombre*.

"That the said Eugène Roget de Belloguet, "up to this day, and without any authority "whatever, acts as the manager and adminis- "trator of the said Estate *Bel Ombre*, to the "great loss, damage and prejudice of Plaintiff.

" That the said Eugène de Belloguet, since " he has assumed upon himself to act as the " manager and administrator of the said " Estate *Bel Ombre*, has continued to reside " and still resides on the *Schœnfeld* Estate, " situate in this Island, in the District of " Rivière du Rempart, that is to say, at a " distance of sixty miles from the aforesaid " Estate *Bel Ombre* and visits this latter " Estate so seldom as to make it impossible, " (even were he otherwise competent,) for " him properly to superintend the working of " the said Estate.

" That the said Eugène Roget de Belloguet " has, in every other respect, shewn himself " unfit for such situation, by committing " numerous blunders, mistakes and errors in " and about the management and administra- " tion of the aforesaid Estate, all of which " were calculated to impede the liquidation " of the aforesaid *Bel Ombre* Estate, which " otherwise would have long since been liqui- " dated, such (among many others) as incur- " ring reckless and unnecessary expenditure " in the cultivation of the said Estate, and " in the erection thereon of sumptuous " buildings and of useless and costly ma- " chineries ; by extending the ground " under cultivation to a disproportionate " measure, and without any result but loss " for the Estate ; thereby engaging the said " Estate in new heavy debts, and allowing to " remain unpaid other anterior debts, which " long before ought to have been paid, by " squandering, at certain times, " *guano* " " and other provisions on the said Estate " *Bel Ombre*," and at other times refusing to " supply the said Estate which the necessary " *guano* for the cultivation thereof. All which " said blunders mistakes and errors the said " Plaintiff will be ready, at the trial of this " cause, to prove by witnesses and other " unimpeachable evidence, and even by the " very alleged accounts lodged with the Regis- " trar.

" By reason of which said several facts " matters and things, (and under the formal " and express understanding that the said " Plaintiff does not, in any way, mean to " accept or approve the several aforesaid " alleged accounts of certain of the Defen- " dants, as aforesaid, which said alleged ac- " counts, as aforesaid, the said Plaintiff on " the contrary, formally repudiates and chal- " lenges, as being altogether informal, unfair, " unreasonable and erroneous, and under the " express reservation of the said Plaintiff's " right to discuss the said alleged accounts, " either before this Honorable Court or the " Master, as the Court shall deem fit and " expedient to order ; and further under the " express reservation of the said Plaintiff's " right hereafter to claim damages, as well " against the above named Eugène Roget de " Belloguet, for and on account of his undue " assumption of the management and admi- " nistration of the aforesaid Estate *Bel Ombre*, " as against the other Defendants, in this " cause, for and on account of their having " allowed and suffered such undue assump- " tion, and for and on account of the loss, " damage and prejudice already, thereby, by " the said Plaintiff suffered, or to be hereafter " suffered.

" An action hath accrued to the said Plain- " tiff to have and demand of the Court Judg- " ment declaring :

" *First.*—That Eugène Roget de Belloguet " never had any right to take, as he has " done, at the time of the death of Jean " Staub above named, the management and " administration of the aforesaid Estate *Bel* " *Ombre*, without the priority and consent of " the Plaintiff.

"*Secondly.*—That the said Eugène Roget de " Belloguet is, by reason of his inexperience, " mismanagement and undue expenditure " upon the aforesaid *Bel Ombre* Estate, " unfit to carry on the management and " administration of the said Estate, and to " liquidate the same in the interest of all " parties.

" *Thirdly.*—And further dismissing the said " Eugène Roget de Belloguet from the afore- " said management and administration, and " appointing *ex-officio* (in case the parties in " this cause should not agree thereupon) a fit " and competent person to take charge of, " manage and administer the said Estate, under " such conditions as the Court may deem fit " and expedient to adjudge and decree, with " respect as well to the general management " and administration of the said Estate, as to " the proceeds of the same and to the share of " such proceeds that the Court might find the " said Plaintiff to be entitled to, pending the " discussion of the above mentioned several " alleged accounts, and until after the final " settlement thereof ; and in case such alleged " accounts be found correct and maintained as " such, then until the liquidation of the afore- " said *Bel Ombre* Estate."

The Defendants pleaded :

" *First.*—That Plaintiff has no right of " action against them and no title or capacity " to prosecute the present action, and to sue " the several defendants, in the several alleged " capacities in the said Declaration set forth.

" *Secondly.*—That Plaintiff has no right to " interfere with the management of the said " Estate ; that the Plaintiff has, by his Coun- " sel, admitted the same in the former action, " and by the Judgment given in the said " cause, on 6th October 1861, the Court has " ruled that the Plaintiff Lortan had no right " to interfere with the management and " conduct of the Estate till it is satisfactorily " established that the Estate is clear.

"*Thirdly.*—And in case the said pleas be "overruled, that the promise of sale, in the "first Count mentioned, was made subject to "certain conditions which are set forth in "the act of co-partnership of 6th October "1850, between Sir E. Rémono and the late "Jean Staub, to which the Plaintiff has given "an unconditional and unreserved consent, "and the said sale was to be effected only "after the entire liquidation, by Jean Staub, "of the Estate "*Bel Ombre,*" as described "in the aforesaid act of co-partnership.

"*Fourthly.*—That they deny the matters "and facts set forth in the said second Count "in manner and form as therein alleged.

"*Fifthly.*—That it is distinctly laid down "and agreed to, in Articles 8 of the act of Co-"partnership aforesaid, that before any of the "sums mentioned by the said Plaintiff could "be paid, all expenses of any nature whatsoe-"ver, made for and concerning the Estate "should be first paid, and that after such "payment the balance to the credit of the "account (if any) should be applied to the "several sums in the said Article 8 of the act "of co-partnership set forth

"And, as to 6th and 7th counts of the "Declaration, as charge these Defendants "with having given erroneous accounts and "which allege that the admistration of the "Estate "*Bel Ombre*" has been ruinous and "calculated to impede the liquidation thereof, "these Defendants deny all and every one of "the facts therein alleged.

"And as to 9th, 10th and 11th Counts "which charge E. Roget de Bellognet, one of "the Defendants, with having taken the "management and administration of the Estate "and with keeping the same, up to this day, "without any authority whatsoever, these "Defendants most distinctly deny that the "said Eugène Roget de Bellognet has assumed "upon himself to act as manager of the Estate "*"Bel Ombre"*, or ever acted in his own perso-"nal name, and without authority; and they "further also deny all the other several facts "and things alleged in the said three Counts.

"And as to the last Count, the said Defen-"dants deny all and several the matters "and things therein alleged, and say that "these said allegations are in direct contra-"diction with the facts admitted by Lortan in "the aforesaid first action, wherein it was "freely admitted that the management, under "Staub and his succession, has been successful, "and that the Estate is enormously increased "in value."

Counsel argued:

Douglas, for Plaintiff: This Court being one of equity, as well as of common law, I am entitled to the remedies I here ask. The Estate would have been liquidated long ago if the two partners, who undertook to pay in a sum of money for the working of the Estate, had done so. The "*Bordereaux*" of the creditors of the Estate were to have been paid off in six years, yet not less than $ 32,000 of these still remain a burden on the lands. The late Staub was, *quoad* the Plaintiff, really a trustee. His duties were special. He failed to do his duty in clearing off the burdens and the successor who had none of his rights has, in this respect, followed his example. For a person, in the state of health and of the age of my client, to object merely to the accounts loged would be of no avail. The Defendants would continue to protract proceedings for years. but I take their accounts as they stand and I say they have failed in their duty to me. The management has been very bad. Staub may have had full powers of administration but de Belloguet has really usurped his position. I am ready to prove all my allegations in any way the Court shall appoint, The real issues are truly raised in the Defendants' pleas. If the Defendants really wished to stand on any point of law, they should have demurred.

G. B. Colin, for Defendants: I have taken up a distinct position in point af law, and purposely and without travelling into other matters. This action must be dismissed with costs. There should have been an ordinary suit for accounts. That is plain, but we have nothing of the sort. The alleged delays that must take place in investigating the accounts, the state of the Plaintiff's health etc, are mere sentimental arguments. It is said we did no, put in the capital stipulated; but who has carried on the Estate to the present moment when we are all agreed that it is worth many times the price paid for it, in 1850, who but my clients? The allegation that de Bellognet has thrust himself into the management is mere moonshine. He was put in by all the parties interested in the Estate. Even had the Plaintiff been entitled to interfere; (which it is *res judicata* he was not,) his interest being only one fourth he would have been completely out voted by the other parties. C. C. 1856. 1864. 1869. Sirey 46.2.315. Duvergier. Volume 1.287. 288. The accounts are not even before the Court in this action.

The Court: The interlocatory order of 16th October 1861, made in the former action, was at once obeyed by the Defendants, and the account of this Estate was lodged with the Registrar. No farther procedure has taken place, in that suit, and, after a considerable interval, the present new action has been raised. We doubt exceedingly if either of its three conclusions can be granted. As to the first of these, (*read,*) the right of the Defendant de Belloguet to manage the Estate, it appears sufficient that he is there by the appointment of all the owners of the property. The Plaintiff's right of property in one fourth share of the Estate, so far as yet appears, has

not emerged. He has not shewn that the Estate is clear of burdens, or that it ought by or before this time, to have been cleared.

The second and third demands, (*read,*) may be considered together of the incapacity of the manager, and the administration of the Estate, generally, and it is not easy to see how any one interested can really complain. It is agreed, on all sides, that "*Bel Ombre*" which, cost $62,000 odds, in 1850, is now very much increased in value and might fetch from $250,000 to $350,000. In popular parlance, this Estate being now worth so very large a sum, and having debts upon it to the amount only of $60,000 odds, might be said to have cleared itself, and to be liquidated, or at least, capable of being, at once liquidated, and it is a maxim of jurisprudence, recognised in some countries, that *quod statim liquidari potest, pro jam liquido habetur*. This mode of reasoning would point at the immediate recognition of the Plaintiff's right to the possession and enjoyment of one fourth of the Estate. But, looking at the special undertaking in the deed of 1850, the basis of the Plaintiff's demand, it does not appear to us that we are as yet warranted to pronounce a judgment finding that the Estate is liquid, and that the Plaintiff is now entitled to get possession of his interest in it.

That the general management of the Estate has been highly advantageous, is, we have already seen, admitted by all parties, but it may be contended that it is another matter altogether, whether the management has been beneficial for the special interests of all parties, and has been such with regard to the Plaintiff as a person in his speculiar position was entitled to insist for. Whether the recital in this Declaration and some of the facts which the Plaintiff proposes to establish in evidence might not suggest a modification of the conclusions in the way of amendment, it is scarcely for the Court to say, but before giving formal Judgment, it may be well to give parties an opportunity of being heard on this point, if that is wished.

The Plaintiff then asked to be allowed to amend his Declaration, by the addition of the following conclusions :

" *First.*—That this Honorable Court, with-
" out entering into the discussion of the
" numerous items of the aforesaid alleged
" accounts, (which however, the said Plaintiff
" is ready to submit to, in case of need,) do
"adjudge and declare that the aforesaid alleged
" accounts, by themselves and the result of
" the same, chiefly shew that not only the
" management of the said Estate *Bel Ombre*
" is far from having been beneficial to the
" Plaintiff, but that it has, on the contrary,
" been calculated and intended to delay, if not
" to impede, the liquidation of the aforesaid
" Estate.

" *Secondly.*—That the aforesaid Estate *Bel*
" *Ombre*, if properly and economically ma-
" naged, due regard being had to the respective
" situation of the parties concerned, and of the
" Plaintiff especially, would have long since
" been liquitated, and that it is by the fault
" of the Defendants that the said Estate is not
" now liquid and clear of burdens.

" *Thirdly.*—And further that this Honora-
" ble Court do adjudge and declare that, by
" reasons of the premises, the aforesaid Estate
" *Bel Ombre* be, to all intents and purposes,
" and in so far as the said Plaintiff is concern-
" ed, held and considered as being actually
" and entirely liquid and free from debt, and
" that the said Plaintiff be put in immediate
"possession and enjoyment of his fourth share
" in the said Estate, liquid and free from any
" debt or debts whatsoever.

" And in case the above conclusions should
" not be granted by this Honorable Court,
" the said Plaintiff then prays Judgment pray-
" ing. . ." (Then the conclusions of the Declaration touching the change of management.)

Douglas, for Plaintiff: These are the amendments to our Declaration which I now propose. (*Reads them.*) I contend that they arise naturally out of the allegations in our Declaration, and particularly out of our statements of facts to be proved, which we have served upon the Defendants. In the case of *Target vs. Roussel and Ors.* 9th September 1862. (Piston II. 122). The Court allowed a Plaintiff to amend, where the Plaintiff's position, as to amendment, was not so favourable.

G. B. Colin, for Defendants, resisted the amendment as inadmissible. The proposal now made is not to amend a defective Declaration, but to make a totally new one. In the case of *Barrellier vs. Jollivet and Ors.* (20th December 1860) and *Picot vs. Nayna and Ors.* 30 May 1862. (Piston, Volume 2, Page 62) decided in this Court, amendments, in circumstances more favourable for the Plaintiffs, were at once rejected by the Court. The parties were nonsuited and the remedy of a new action was all that remained to them. The Court cannot look at the Plaintiff's notice of facts which he proposes to establish in evidence, he must be confined to those set forth in the formal Declaration; to permit the amendments here proposed would be to enter on a course fraught with the greatest danger to the accuracy of pleadings and would open the door to great abuses.

The Court said: It does not appear to us that the amendments, in the shape in which they are proposed by the Plaintiff, ought to be admitted at this stage of the case, but one of them, viz: the second, may be thought to stand in a different position. The power of amendment vested in the Court is very broad, and " at any stage, " we are au-

thorized to amend defective proceedings, so as, if possible, "in the existing suit, to determine the real question in controversy between the parties." Accordingly we have applied this rule, in the different cases coming before us, from time to time, according to appreciation of the facts and position of the litigants in each individual case

The meaning of the Statute (and of our Rule 73) on amendment, is clearly this: that the Judge or Court is to enable parties to raise the question, not *every* question, that might be raised. It was intended that if, at the trial one of the parties found he could not succed upon what was disputed, he should be enabled to dspute something else that happened to come out in the course of the evidence. All questions are to be excluded, and intentionally so, except those which the parties hopet, and intended to try in the cause, and as do them, amendments are to be made "so as the real question in controversy may be determined."

William vs Reed, Law Journal, 1854, Vol. 32. Com. Law. Pages 193.197.

In the present case the second of the conclusions, now proposed by the Plaintiff, arises naturally enough, out of the narrative of facts in his Declaration, and the result of the inquiry under it will probably go a long way to determine the real question in dispute, in this somewhat special case, viz: whether the administration of the Estate, by Staub and de Belloguet has been that of a *Bonus Pater familias*, in reference to Lortan. Had the conclusions in question not been supported by the narrative of the Declaration, we should have had great difficulty in admitting the amendment, as we concur in the Defendants' argument, that the Plaintiff's case must be fairly disclosed in his Declaration, and that it is not enough, that material allegations are contained merely in the notice of facts which he serves upon the Defendant. The Court therefore admit the addition of the second conclusion proposed by way of amendment. All other questions, including questions of Costs, reserved.

Supreme Court,

Société civile entre les acquéreurs d'une propriété sucrière, — Avances, — Consignation, — C. C. Arts. 1291, 1852, 1856, 1860, 1864, 1988.

Circonstances en vertu desquelles il a été décidé que les avances faites un propriétaire de plusieurs établissements de sucreries doivent être remboursées sur la coupe des dites propriétés, conformément aux avances faites à chacunes d'elles, même lorsque l'une de ces propriétés n'appartient pas en totalité à celui en faveur de qui les avances ont été faites.

Les transactions faites par un débiteur, avant sa suspension de paiement, et avant sa Cession de Biens, sont de nul effet, quand à ses créanciers, en vertu des Arts. 45 *et* 46 *sur la Cession de Biens, même lorsque la Cession de Biens a été retirée à la suite d'un Concordat.*

Deed of partnership for the cultivation of a sugar estate,—Advances,—Consignation of sugars,—Suspension of payment.—Settlement of accounts,—Compensation,—C. C. Arts. 1291, 1852, 1856, 1860, 1864, 1988.

Circumstances under which it has been held that the advances made to the owner of several sugar estates should be repaid from the crops of the said estates, conformabty to the advances made to each of them, ever when one of these sugar estates did not belong for the whole part to the owner in favor of whom the advances had been made.

The transactions made by a debtor, after he has stopped payment, and before his Cessio Bonorum, are null and void with regard to his creditors, by Arts 45 *and* 46 *on Cessio Bonorum, even when the Cessio Bonorum has been annulled in virtue of an Arrangement.*

Numbers of Record: 7784, 7799, 7822

SÉVENE & ORS., Appellants
versus
HARDY & ORS., Respondents
and
ROQUERBE, Intervening Part.

H. Kœnig,—Of Counsel for Appellant.
E. Boullé,—Appelant's Attorney.
J. L. Colin,—Of Counsel for Respondents.
J. Pignéguy,—Respondants' Attorney.
G. B. Colin,—Of Counsel for Intervening Party.
A. J. Colin,—Attorney for same.

AND
ROQUERBE, Plaintiff
versus
HARDY & ORS., Defendants.

Before:
His Honor the Chief Judge and
The Honorable N. G. Bestel 2d P. J.

G. B. Colin,—Of Counsel for Plaintiff.
A. J. Colin,—Plaintiff's Attorney.
H. Kœnig, J. L. Colin, } Of Counsel for Defendants.
E. Boullé, J. Pignéguy, } Defendants' Attorney.

23rd December 1862.

Some of the features of these cases were the same as those of *Gausseran and Ors. vs. Roquerbe*, decided in this Court on 15th November 1861 ; (*Vide Vol.* 1 *P.* 162.) but the position of parties and the facts of the cases were, by no means, identical.

Sévène and three other parties, having purchased the Estate *Belle Etoile* in 1858, had entered into a contract of partnership for working it. The deed of society contained, among others, the following covenants :

" Par suite de la vente qui précède, les ac
" quéreurs, Messrs F. Sévène, A. Hardy, E.
" Hardy et Mme. E. Bussy de St. Romain,
" forment entre eux une société civile et par-
" ticulière pour l'exploitation de la dite ha
" bitation.

" La durée de cette société est fixée à 7
" années, à partir du 1er. Fevrier 1858. Elle
" finira en conséquence le 1er. Fevrier 1865,
" à moins qu'il ne convienne alors aux asso-
" ciés de la prolonger.

" Chaque associé participera aux bénéfices
" et supportera les pertes dans la proportion
" d un quart.

" M. St. Romain aura l'administration de
" la propriété. Il engagera les hommes dont
" il aura besoin pour l'exploitation et fera
" tout marché ne dépassant pas $500. Il lui
" est alloué une somme de $150 par mois. I
" paiera lui même ses domestiques.

" M. Ange Hardy fera les avances néces-
" saires pour l'administration et la culture de
" la dite habitation. Il recevra les produits et
" les vendra pour le compte de la société. Il
" lui est alloué une commission de 2½ p. o|o
" sur le montant brut des ventes. Les avance
" de M. Hardy porteront intérêts 10 o|o l'an.
" Si Monsieur Hardy a besoin, pour les avan-
" ces de la propriété, de négocier des valeurs,
" il est autorisé à souscrire des billets ou des
" mandats ; mais ces billets n'engageront la
" société qu'en tant qu'ils seront faits pour les
" affaires de la société.

" Les comptes de M. Hardy et de M. St.
" Romain seront arrêtés le 1er Avril de cha-
" que année. Toutes les mesures qui seraient
" dans l'intérêt commun des propriétaires, et
" qui ne peuvent être prévues par le présent,
" seront décidées en assemblée générale."

By the notarial deed of 29th May 1860, the terms of which are fully recited in the report of the case of *Gausseran and Ors. Versus Roquerbe*, Roquerbe agreed with Hardy to open, for him, on the terms therin setforth, the very large credits of $364,000 ; $200,000 for the purposes of various sugar estates, and among others *Belle Etoile*, receiving in return, and for sale, the sugars the produce of those establishments. In the present cases it was in evidence that a portion of these advances, to Hardy, had been applied, by him, for the benefit of *Belle Etoile*, and the delivery of sugars, in return, was made, by Hardy to Roquerbe, till the 10th October 1861, when Hardy's affairs became embarrassed, and in his own words, " he stopped payment."

At this time the other proprietors of the Estate refused to allow the sugars any longer to reach Hardy, and consequently the delivery to Roquerbe instantly stopped. Roquerbe attached the sugars in the hands of the partners, demanded a state of accounts, from Hardy, that he might ascertain what balance the Estate was owing him, and raised a suit to have it found by the Court that all the sugars of the crop of 1861, 1862, so far as Hardy's individual share was concerned, and also the rest of the said sugars, to the extent of the said balance, due by the Estate to Hardy, (to which amount Roquerbe limited his demand) should be delivered to him (Roquerbe.) The other partners also called upon Hardy, by two actions which were consolidated, to have their accounts adjusted. The striking of the balance, in that conjoined suit, was referred to the Master, and Roquerbe, on the 30 April 1862, was allowed to intervene for his interest, and as entitled to exercise the rights of his debtor Hardy.

On 23rd. December 1861, Hardy had filed a Petition for a Cessio Bonorum. On the 14th January 1862, arrangement was come to with his creditors, and under Article 35 of the Ordinance of 1856, the Cessio was declared to be annulled (*Vide suprà* Page 1.)

At the outset, and in his balance sheet, in the Cessio, Hardy stated that the sum, due to him by Sevène and the other partners, was $20.146.98 ; but after certain admitted rectifications the balance was reduced to $11.961. 92. Roquerbe, in the discussions before the Master, contented that that sum was truly due by Sevène and Ors to Hardy, while they maintained that the real balance was only $ 4146.83, as they were entitled to deduct the sum of $ 8714.92, the amount of certain promissory notes, subscribed by Hardy, which they had purchased from Lucas, *à forfait*, on 20th November 1861, and for which Hardy had granted a receipt to his partners. The Master refused to allow Sévène and others credit for this payment, on the ground that Hardy, at the date of the alleged arrangement, was in a state of insolvency.

In the discussion before the Court, which was taken in all the cases at the same time, various points of law were examined. *Inter alia*, KŒNIG, for Sévène and others, maintained that the decision of the Court, in the former case of *Gausseran*, had no application here, as the terms of the deed of partnership were quite different. (*Reads clauses.*) Hardy

was not the manager, he was not bound to find funds, and the other partners had nothing to do with that matter, and were not bound by any arrangement Hardy might have made with Roquerbe. But in any view, the sum payable to Hardy. by the other partners, must be reduced by the sum of $7814.92, the amount of Hardy's bills, paid by them on 30th November 1861, and for which Hardy acknowledged receipt. There was no law to prevent Hardy taking payments at that date, as the Cessio was not then in existence ; and besides, it was annulled by a Judgment of the Court of Bankruptcy, and so, must he had as having never been applied for. Even if Hardy had not acknowledged receipt, the debt due to him, by Sévène and Ors., would, by the law of compensation, have been *pro tanto* extinguished.

PARDESSUS. *Doit Com.* V. 4. Page 580. *C. Com.* Article 443, with notes by GILBERT, but particularly. No 59.

That matter was ended,it was a *fait consommé* before any intervention of Roquerbe. Sections 45, & 46 of the Ins. Ord. of 1856 dont apply here, either in letter or spirit ; no undue preference was given to my client, and the whole Cessio fell, when annulled by the Court.

G. B. COLIN, for Roquerbe : I don't say this case is precisely the same as that which my client had last year to maintain against Messrs Gausseran and others, but I submit, looking at the terms of the partnership, that my position is, if possible, stronger than in the first discussion. (*Reads clauses of partnership.*) St. Romain was the mere Agricultural Manager, Hardy had not only all the funds to provide, but he could sell the whole produce, yet it is maintained that he could not pledge a part of it, for advances, surely a far less power. He was authorized to sign bills for the advances made to him, a power which did not exist in Gausseran's deed. I refer to the authorities quoted in that Case. They more then support my contention here. Besides, the course of dealing fixed my rights. Sevène and others were fully aware of all the facts and of the position of Roquerbe, whose advances were made for their advantage,and had no right to put an end to that dealing because Hardy was insolvent. Far less had they any right to attempt to defeat my claim against Hardy by getting hold of some of his floating papers, surreptitiously putting the amount to his debit and getting a receipt from him, as if they had paid him money down.

SIREY,31 : 2 : 176—32 : 1 : 429—33 : 1 : 657, PARDESSUS,No. 125 : 4. ADOLP. & ELLIS: Page 332, and other English cases.

There could be no compensation between sugar and money.

THE COURT : On the general argument, submitted to us by the Counsel for Roquerbe, supported by the authorities which are so far the same as those in the former case of Gausseran and others, we are of opinion that the actings of Hardy,in getting the advances from Roquerbe, for the *Belle Etoile* Estate, were binding on his co-partners Sevène and Ors. It is established that funds were so procured for the Estate, and were applied in the cultivation of the lands and production of the sugar crop, for the benefit of all the partners. Of this arrangement, we are satisfied, the partners were fully avare, and it went on, for a long time, with their knowledge, till Hardy stopped payment on 10th October 1861.

But a second question remains: namely, to what extent were funds so furnished, by Roquerbe, for the Estate *Belle Etoile*? This part of the cause has been taken on the footing that Roquerbe asks no more than the balance actually due to Hardy by his co-partners, on the adjustment of the accounts of the estate. Now what is that balance? Is it $11000, or only $4146,83 ? In other words, shall Sévène and Ors., be allowed credit for the bills of Hardy, taken up by them from Lucas, in November last year,and for payment of which he granted a receipt ?

We think not.

Hardy was then in a state of insolvency quite notorious and well known to those parties. It was the very reason which made them stop the sugars on their way to Roquerbe. Bound as we hold the whole partners to have been to Roquerbe, for the advances *in rem versa* of the Estate, no settlement between or among themselves could affect his rights. In a question with Hardy that settlement may be available to his partners, but it cannot reduce the demand of Roquerbe.

Therefore, in the first case, the Court confirms the Judgment of the Master, as to the amount of the balance payable to Hardy, with costs to Roquerbe, the intervening party ; and in the second case, gives judgment for the Plaintiff Roquerbe, and orders delivery of the sugar in question to be made to him (1o.) so far as that sugar is the individual property of Hardy, as a partner entitled to one fourth share of the Estate, and farther (2o.) so far as may meet the balance of the account due to Hardy by his co partners, the amount to be recovered under this Judgment not to exceed, in all, the said sum of $11.961.92, the balance found by the Master ; interest at 9 o|o.

Costs to Roquerbe against the Defendants.

Supreme Court.

COURS D'EAU,—BARRAGE,—RIVERAINS,—TRIBUNAL TERRIER,—COMPÉTENCE ET ATTRI.

BUTION DE CE TRIBUNAL,—"WRIT OF INJUNCTION,"—ART. 644 DU C. C.

RUN OF WATER, — DAM, — BORDERERS OF RIVERS AND CANALS,—LAND COURT,— JURISDICTION AND POWERS OF THE LAND COURT,— WRIT OF INJUNCTION, — ART. 644 OF THE C. C.

Number of Record : 7924.

SICARD, Plaintiff.

Versus

LEMERLE, Defendant.

Before :
His Honor The CHIEF JUDGE, and
The Honorable N. G. BESTEL, 2nd. P. J.

S. J. DOUGLAS,—Of Counsel for Plaintiff.
SLADE & BANKS,—Plaintiff's Attornies.
G. B. COLIN,—Of Counsel for Defendant.
A. J. COLIN,—Defendant's Attorney.

23*rd December* 1862.

Vide Vol. I. P. 207 & *Suprà P.* 12.

In this action the Plaintiff sought to recover, from the Defendant, the reduced sum of £900, instead of £1200 originally demanded, as compensation for the wrongs in his Declaration set forth and alleged to have been sustained by him from the acts and deeds of the Defendant. These wrongful acts were thus set forth in the Declaration :

" Whereas, before and at the respective " times of commission, by the Defendant, of the " several wrongful acts hereinafter complain " ed of, the Plaintiff was, and from thence " hitherto has been, and now is, proprietor " of a certain piece of ground situate at " Pailles, in the District of Moka, and also " of a certain flour mill, erected thereon, " which said flour mill was and is turned by " means of a water wheel ; and whereas, long " before, to wit : more than seven years, be- " fore the commission of the said wrongful " acts, one of the former proprietors of the " said portion of ground and mill, under " whom the Plaintiff derives title, had erected " and constructed right across the bed of a " certain stream called the *Rivière Sèche*, " which forms the border to the Plaintiff's " said property, a certain dam in masonry, " from one bank to the other, of the " said stream, whereby the whole of the " water of the said stream was directed, from " its natural course, into a certain canal, upon " the Plaintiff's said property, leading to the " wheel of the said mill, by means of which " said dam and canal all the water of the " said stream was made to pass over the said " wheel, and after turning the same was again " returned into the bed of the said stream, " which said dam, together with the whole of " the waters of the said stream, were peaceably " publicly and without interruption enjoyed " and used, in manner and for the purpose " aforesaid, by the Plaintiff and the former " proprietors of the said piece of land, from " the date of the erection of the said dam un- " til the commission, by the said Defendant, " of the wrongful acts hereinafter complained " of.

" Whereas the Plaintiff, being in such *de* " *facto* possession of the said dam and water, " did, by Petition under date the 21st July " last past, petition the Executive Council of " this Colony, sitting as a Land Court, praying " the said Court to grant to him the full " enjoyment of the water of the said stream, " and to maintain him in the full enjoyment " of the said dam, in like manner and to the " same extent as he, the Plaintiff, had there- " tofore *de facto* enjoyed the same, respecti- " vely, which said Petition was, afterwards, " by a final Judgment of the said Land Court, " under date the 28th June 1860, granted, in " so far that the use and enjoyment of the " water which had been so appropriated by " the Plaintiff, as aforesaid, by means of the " said dam, might, in future, be used by the " Plaintiff, provisionally, and until it might " be required for purposes of more general " utility, subject, amongst other things, to " the condition that the canal, dam and race " of the said mill should remain as they were, " at the date of the said Petition, that is to " say, that they be neither deepened nor " widened.

" Whereas, pending the consideration, by " the Land Court, of the Plaintiff's said Peti- " tion, the Defendant, claiming to be proprie- " tor of a certain portion of land on the " opposite bank of the said stream to the " Plaintiff's said land, and at that part where " the said dam had been constructed across " the bed of the said stream, from bank to " bank of the stream, did, to wit, in the " month of July 1860, commence unlawfully " to disturb the Plaintiff in the peaceful enjoy- " ment of the said dam and water, by breaking " and injuring the said dam, and the Defen- " dant did, afterwards, to wit, in the month " of September 1860, cause the said dam to be " broken, so as that a great portion of the " water of the said stream was diverted from " the Plaintiff's said canal and wheel, and " the Plaintiff was thereby deprived of the " supply of water necessary for turning the " wheel of his said mill, and also thereby " prevented from working his said mill, and " thereupon the Plaintiff, on or about the " 11th June 1861, instituted proceedings be- " fore the District Court, at Moka, being the " competent Court to entertain the same " against the said Defendant, in a pos- " sessory action, claiming as against the De- " fendant, to be maintained in the possession " of the said dam and river ; and thereupon, " by the consideration and Judgment of the " said Court, it was, on the 6th August 1861,

" ordered and adjudged that the Plaintiff be " maintained in the possession of the " said dam and water, with costs against " the Defendant, which said Judgment having " been appealed from, by the now Defendant, " was by the Judgment of the Supreme Court, " sitting as the Bail Court, on the 22nd day " of October 1861, affirmed, the Defendant's " said appeal being thereby dismissed with " costs.

" And whereas the Defendant, afterwards, " to wit, on the 28th October 1861, not " regarding the said last mentioned Judgment " and also the before mentioned judgment, of " Both of the Land Court, of which said Judg- " ment, he then had due notice, did send a " certain servant of his, named Alphonse, with " instructions to break the said dam, which " had then been temporarily repaired, so as to " enable the Plaintiff to use the water of " the said stream for his mill, as he had " heretofore done, and the said Alphonse, " having proceeded to break the said dam, " was only prevented accomplishing his " purpose by the interference of the Police, " and thereupon the Plaintiff did, to wit, on " the thirty first day of October 1861, repair " the said dam in masonry, restoring the same " to exactly the same condition in which the " same was, at the time of the presentation " of his aforesaid Petition to the Land Court, " and did, in all respects, conform to, and " fulfil the conditions of the aforesaid Judg- " ment of the Land Court, confirming him in " the enjoyment of the said dam and water, and " the Plaintiff did also then apply to and obtain " from the Honorable Sir Jean Edouard " Rémono, one of the Judges of the Supreme " Court, an Injunction, whereby the said " Defendant was enjoined, from thence forth, " altogether and absolutely to abstain from " breaking down or in any way injuring the " said dam, and also to abstain from troubling " or hindering the Plaintiff in the quiet and " peaceable possession of the said water; which " said Injunction was duly served upon the " Defendant, on the 23rd day of November " 1862; nevertheless the Defendant did af- " terwards, to wit, on the 26 day of Novem- " ber 1861, in contempt of the said Injunction, " cause the said dam to be again broken, " thereby troubling and hindering the Plain- " tiff in the quite and peaceable enjoyment of " the said water, and cutting off, from the " Plaintiff's mill, the supply of water necessa- " ry for working the said mill.

" And the Plaintiff avers that, by reason of " the premises, he, the Plaintiff, has, to wit: " for the space of 18 months last past, by the " wrongful acts of the Defendant above set " forth, been hindered and prevented in the " enjoyment of the said dam or water, and has " also been prevented from carrying on " his trade as a miller, at his aforesaid mill, " by reason of his said mill being deprived " by the Defendant's said acts, of the supply " of water, to turn the same, thereby losing " all the profits of his said trade, which he " might or otherwise would have realized " during such last mentioned period, and the " Plaintiff has also been otherwise greatly " demnified to the Plaintiff's damage of " twelve hundred pounds sterling. Wherefore " he brings his suit &a., &a.

The facts declared upon were generally and specially denied by the several pleas of the Defendant which run in the following terms.

" And, as to the first part of the Plaintiff's " Declaration, the Defendant says.

" That he denies that one of the former " proprietors of the portion of ground alleged " to be the property of Sicard, had erected and " constructed, right across the bed of the river " or stream called " Rivière Sèche," a dam " in masonry, from one bank to the other of " the said stream, whereby the whole of the " water of that said stream was diverted from " its natural course into the canal mentioned " in the said Plaintiff's Declaration. And that " the Plaintiff and the former proprietors of " the said piece of land ever enjoyed or used " peacefully publicly and without interruption, " the said dam, together with the whole of the " waters of the said stream, as alleged by the " Plaintiff in his said Declaration.

" That about seven years ago, a dam was " erected in the said stream or river, but not " right across the said River.

" That it did not rest upon the opposite " bank of the River belonging to this Defen- " dant, but that there was an opening of about " three feet, between the further end of the " dam and the said opposite bank, whereby a " large quantity of the waters of the said " River always flowed into their natural course, " until the end of the year 1860, when Sicard " began to obstruct the said opening, by " throwing mud into it, and tried to block it " up, but was prevented from so doing by the " said Defendant, as a borderer having right " to the said waters, and being entitled to one " half of the bed of the River.

" And, for a further plea, in this behalf, the " Defendant says:

" That, at the time of the grievances alleged " in the Plaintiff's Declaration, he was the " proprietor of, and possessed a piece of land " on the bank of the said stream and river, " opposite that of Sicard, and bordering the " said "Rivière Sèche," the occupiers whereof " always enjoyed, as of right, and without " opposition, the waters of the said " Rivière " Sèche."

" That the waters of the said stream or " river, called " Rivière Sèche," are, by law, " the common property of the borderers of the

" said River, who have the right to enjoy the " same as they pass their said properties, and " that Sicard, or the former proprietors of his " land, had no right, by law, to erect or cons- " truct, in the bed of the said River, any Dam " or other work which could divert the " waters of the said River.

" And, for a further plea in this behalf, this " Defendant says :

" That the Plaintiff ought not, at any time, " to have had or enjoyed, nor ought he still " to have or enjoy, the illegal dam which has " been illegally erected across nearly the " whole breadth of the said River, nor ought " the waters of the stream or River, which " are directed by means of the said illegal " dam, to run or flow to the mill of the Plain- " tiff.

" And, as to the second part of the Plaintiff's " Declaration, this Defendant says :

" That, at the time of the Petition adressed " by Plaintiff to the Executive Council, sitting " as a Land Court, to wit : in July 1860, the " said dam was not then erected right across " the said river, and did not divert the whole " waters of the said river. But that the ope- " ning aforedescribed then existed, whereby a " large portion of the waters of the said river " ran into its natural course, and that the said " Plaintiff was not then in possession of the " said dam and water, in manner and form as " by him alleged.

" And, for a further plea in this behalf, " the Defendant says :

" That the Executive Council, sitting as a " Land Court, had no Jurisdiction in and over " the matters set forth in the said Petition of " the Plaintiff, and prayed for by him, and " had no right or authority to maintain the " said Plaintiff in possession of an illegal " right.

" And, for a further plea in this behalf, the " Defendant says :

" That, at all events, the Judgment of the " Land Court, of the 28th June 1860, allows " the Plaintiff to use provisionally the waters " which have been appropriated by him at the " time of his Petition, but not those which " then flowed in and through the opening " between the further end of the said dam " and the property of Defendant ; and that " the said right is allowed subject to the con- " dition that the said dam should remain as " it was and should not be widened or dee- " pened.

" And, as to the third part of the Plaintiff's " Declaration, the Defendant says :

" That he denies all and every one of the " facts therein set forth in manner and form " as alleged.

" That the Judgment therein mentioned is " a Judgment by default, which, like the " Judgment of the said Court and the Injunc- " tion in the said Declaration mentioned, " maintained the Plaintiff in possession of the " dam which had been orignally erected in " the said River, and in the same state in " which it was at the time of the alleged " grievances by the said Defendant, that is " to say, of the dam which had been construc- " ted and then existed across a portion of the " river, and between the further end of which " and the opposite bank of the River, there " was an opening of about three feet thro' " which the waters flowed into their natural " course ; but not of a dam right across the " said river which had never existed.

" And, as to the fourth part of the said " Plaintiff's Declaration, the Defendant " says :

" That he denies all the facts therein set- " forth in manner and form as alleged.

" That he has always duly obeyed the In- " junction therein mentioned, and has never " touched or injured the illegal dam of which " the Plaintiff had possession.

" And, as to the last part of the said Decla- " ration, the Defendants says :

" That he denies the facts therein mention- " ed. That the Plaintiff has not, for the space " of 18 months last past, nor for any space " whatsoever, been hindered and prevented in " the enjoyment of the dam and water of " which he had the enjoyment and possession, " and that he has not been prevented from " carrying on his trade as a miller, at his " aforesaid mill, by reason of the causes " therein set forth. That, in fact, his mill has " always been worked and is, up to this day, " being worked, by the same quantity of water " which Plaintiff used by means of the original " dam above described.

" That the Plaintiff has never enjoyed or " used the whole of the waters of the said " river, to turn the wheel of his mill, and that " a much lesser quantity is and has always " proved sufficient to turn the said wheel.

" Wherefore this Defendant prays that the " Plaintiff's action be dismissed with Costs."

The Plaintiff replied in the following terms :

" As to the latter portion of the second " Plea to the first part of the Plaintiff's " Declaration, in which the Defendant says " as follows : *That the waters of the said* " *stream and river called Rivière Sèche are,* " *by law, the common property of the bor-*

" *derers of the said river, who have the* " *right to enjoy the sameas they pass their* " *said properties, and that Sicard, or the* " *former proprietors of his land, had no* " *right, by law, to erect or construct in the* " *bed of the said river any dam or other work* " *which could divert the watders of the said* " *river,* the Plaintiff saith that the Defen- " dant is stopped at law from availing himself " of his plea above set out, for that the issue " sought to be raised in and by the same " plea is an issue which has already been " raised, and upon which Judgment has been " given, by a competent legal tribunal and the " proper Tribunal, to hear and decide the said " issue,to wit : the Executive Council, sitting " as a Land Court ; and further that the said " Judgment, so given as aforesaid, still re- " mains in full force and virtue, no appeal " having been made of the said Judgment, " is that the said judgment conclusive as " to the issue in and by the above plea " sought to be raised, and that the only " appeal, allowed by law, is an appeal to Her " Majesty in Privy Council. That until the " said Judgment is modified or reversed it is " good, valid and binding upon the Defen- " dant,to all intents and purposes whatsoever. " That the Defendant seeks, by his said " plea to obtain a Judgment of the Supreme " Court upon a matter which is in the nature " of an appeal from the Executive Council, " sitting as a Land Court, and which it is not " within its competence or jurisdiction to " decide, unless the same matter be specially " referred to it by the Executive Council, " sitting as a Land Court, which the issue, " sought to be raised by the above set out " Plea, was not. Wherefore the Defendant " ought to be stopped from availing himself "ofthe said Plea and Judgment thereon should " pass for the Plaintiff.

" And, for a further Replication to the " said plea, above set out, the Plaintiff says " that if, as is alleged by the Defendant : " *Sicard or the former proprietors of his land,* " *had no rights, by law, to erect or construct,* " *in the bed of the said river, any dam or* " *other work which could divert the waters of* " *the said rivers;* the Plaintiff had been " maintained in the enjoyment and use of the " said dam or work and water of the said " River by the Judgment of the Executive " Council, sitting as a Land Court, in the " Declaration set forth, and which Judgment " is unappealed from and in full force.

" And, as to that part of the second plea to " the second part of the Declaration pleaded,in " which it is alleged : *That the Executive* " *Council, sitting as a Land Court, had no* " *Jurisdiction in and over the matter set forth* " *in the said Petition of the Plaintiff,&a.* ; the " Plaintiff says that the Defendant is estopped, " at law, from availing himself of his Plea " above set out, for that it is, by law, within " the competence of the Executive Council, " sitting as a Land Court, to decide for itself " what matters are within its jurisdiction and " competence, and further that upon a deci- " sion being come to, or upon a matter being " entertained by the said Executive Council, " sitting as a Land Court, the same Court " has good and lawful jurisdiction in and " about such matter. That,in a suit before the " said Court, and to which the Defendant and " the Plaintiff were parties, or of which the " Defendant hnd notice, the Court exercised " jurisdiction, in this matter, and confirmed " the Plaintiff in the use and enjoyment of " the said dam or other work and water, " wherefore the Defendant is estopped from " saying that the said Court had not juris- " diction in the matter, and further that the " Judgment of the said Court still remains in " full force and virtue, no appeal having been " made from the said Judgment. That the " same Judgment is conclusive, as to the " issue, in and by the plea last above set out " sought to be raised, and that the only " appeal allowed by law is to Her Majesty's " Privy Council.

" That, until the said judgment is modified " or reversed, it is good, valid and binding " upon the Defendant, to all intents and " purposes whatsoever. That the Defendant " seeks, by his said plea last before set out, " to obtain a judgment of the Supreme Court " upon a matter which is in the nature of an " appeal from the Executive Council, sitting " as a Land Court, which is not within the " competence and jurisdiction of this Court to " decide, unless the same be specially referred " to it by the said Executive Council, sitting " as a Land Court, which the issue so by the " plea, last before set out raised, was not nor " ought not to have been.

" Wherefore the Defendant ought to be " estopped from availing himself of the said " Plea, so last hereinbefore set out,and judg- " ment thereon should pass for the Plaintiff.

" And,as to the other pleas by the Defendant " pleaded, the Plaintiff takes issue and prays " the judgment of the Court with costs."

The Defendant rejoined in these terms :

" That he is not estopped, at law, from " availing himself of the several pleas in the " said Replication set forth.

" That this Honorable Court is, by the " law of Mauritius, a proper and the compe- " tent Court to hear and decide of the several " issues raised by the said several pleas.

" That the Plaintiff, having declared upon " the alleged Decree of the Land Court,it was " the right of the Defendant to plead thereto.

" That the Decrees of the Executive Coun- " cil, sitting as a Land Court, cannot be bind-

" ing on the Judges of the Supreme Court, " in matters which are of the competency of " the said Supreme Court, and cannot pre- " clude the said Supreme Court from taking " cognizance and deciding of the respective " rights of suitors before their Court.

" That, at all events, the above action is " altogether different from the alleged suit " alleged to have been decided by the said " Court, and that the plea first mentioned " in the said Replication has never been raised, " tried or decided before the said Land Court.

" That the Decree of the Land Court, men- " tioned in the said Replication, is not a final " Decree and does not decide finally on the " rights of the parties thereto.

" That the damages, claimed by the Plain- " tiff, are for certain grievanees alleged to " have been committed by Defendant, long befo- " re the alleged Decree, which (supposing it " have any influence in the case, which is " denied,) cannot have any retroactive effect " according to the law of Mauritius.

" That there has never been a suit before " such land Court, between the Plaintiff " and the Defendant, as alleged in the said " Replication. That this Defendant has never " been called upon or allowed to be heard " personally or by Counsel, before the said " Court. But that, on the contrary, every " proceeding of the Land Court, in the matter " of the Petition of D'Aubin Sicard, mentio- " ned in the Plaintiff's Replication, has been " had and taken with closed doors."

On the argument, Douglas, of Counsel for the Plaintiff, contended that, even before the Defendant had purchased the portion of land, on the side of the stream called " Rivière Sèche, " and opposite to Plaintiff's bank a dam had been built by Plaintiff's predecessors, with the consent and, at all events, without any opposition on the part of the Defendant's vendor, Desvaux de Marigny, for barring and diverting the whole of the water of the stream for the purpose of turning the wheel of a corn mill.

That the said dam went right across the said stream, resting, on one side, on Plaintiff's land, and on the other, in and upon the land of the Defendant; that the Defendant, having on several occasions attempted to alter the original state of the dam, on the side next to Defendant's land, the Plaintiff Sicard, on 21st July 1860, petitioned the Executive Council, sitting as a Land Court, for " the grant of the full enjoyment of the watercour- se in the Petition mentioned, and that he be maintained in the full enjoyment of the said dam, from which the water is running down to the Petitioner's corn mill.

Upon reference of Sicard's Petition, by the Land Court to the Surveyor General, for re- port, this officer deputed Duncan, the acting assistant Governement Surveyor, to report on the Plaintiff's Petition, which Report, un- der date the 14th September 1860, concludes thus :

"I therefore consider the Petitioner's state- ments correct, and that there is no objection to his prayer being granted." To this report is annexed a rough sketch of the *locus in quo*, shewing the extension of the dam from Plain- tiff's and Defendant's banks. The then Acting Surveyor General, Corby, concurred in the Report of his deputy.

A copy of Sicard's Petition was served on the Defendant who objected to the granting of Sicard's prayer, on several grounds. The Plan annexed by Lemerle to his objections shews the dam extending from bank to bank and resting upon his Lemerle's land.

The objections of Lemerle were, to a cer- tain extent, overruled by the Land Court, whose Decree is, in a great measure, the echo of the Report of the then Acting Surveyor General, dated the 20th May 1861 :

" Upon the Motion of the Queen's Attor- " ney,

" The Court orders that the Petitioner's " prayer, in so far as the use and enjoy- " ment of the water which had been appro- " priated by him, by means of the dam, " as mentioned in the said Petition, might in " future be used by him, should be granted " provisionally and until it might be required " for purposes of more general utility, and " subject always to the same *grant being can- " celled or in any wise* altered by the Court " as to the Court might hereafter seem to be " necessary or expedient, *upon any motion* to " be made to this Court, at the instance *of " any party interested*, and subject, particular- " ly, to the conditions that the Canal, dam and " run of the said mill remain as they were at " the date of the said Petition, that is to say, " that they be neither deepened nor widened, " as established by the text thereof."

This Decision of the Land Court might have been, not only altered but even cancelled by the Court, upon a motion of Lemerle to that Court, or an Appeal to Her Majesty in Her Privy Council might have been entered by the Defendant, if he were aggrieved thereby. But Lemerle, said Douglas, preferred taking the law into his hands and, in contempt of the judgment of the Land Court, he repeatedly caused the dam to be broken on the side next to his land, by a breadth or 2 or 3 feet, thus establishing an outlet for the water of the stream, thereby rendering the dam of Sicard utterly useless and depriving him of the pos- sibility of working his corn mill for a long space of time, to wit : for the space of 18

months, thereby entailing upon the Plaintiff the loss to the amount declared for and fully proved by the evidence adduced by the Plaintiff.

The Injunction of the Supreme Court met with contempt from breach of its order. (See PISTON's Report. 1862 p. 12. *Sicard vs. Lemerle*). The Magistrate's Judgment for the quiet possession and enjoyment, by Sicard, of the dam the Defendant refused to obey, (See PISTON's Report. 1861. p. 207 *Lemerle v. Sicard.*) Thus has Plaintiff been driven to the introduction of this action for putting a stop to the further perpetration of the evil complained of.

G. B. COLIN, of Counsel for the Defendant. The several breakings of the dam, by Defendant, were resorted to for the purpose of preventing the Plaintiff from acquiring an easement on the land of Defendant. The breakings have been repeated by reason of the obstinacy of Plaintiff in his repeated attempts at changing the original state of the dam, which, at first, was nothing more than a jetty projecting into the river to within 2 or 3 feet of Defendant's land.

The extension of the jetty beyond the center of the bed of the River might have been resisted by the Defendant; but not having an immediate want of the water wrongfully appropriated by the Plaintiff, Lemerle merely objected to the conversion of the jetty into a dam resting on Defendant's land.

His resistance to the acts and deeds of Plaintiff after judgment of the Land Court, was perfectly lawful and legal, the Land Court being without jurisdiction to deprive the borderer of a river or stream of his right, not to the ownership but to the use of the water of such river or stream; and to impose, upon such borderer's land, an easement against the will of the owner of the land. That the Land Court had no such right clearly appears from the text of our Law, Art. 644 of the Civil Code, wherein it is enacted that:

"Celui dont la propriété borde une eau "courante, autre que celle qui est déclarée "dépendance du domaine public par l'Article "538 au titre de la distinction des biens, "peut s'en servir à son passage pour l'irriga-"tion de ses propriétés."

If it were said that the ownership of our colonial waters is in the Crown, by virtue of the retrocession to King Louis of France, by the then French India Company, of the Island and its appurtenances; that the said ownership necessarily vested in the Crown of England on the change of soverignty, in 1810, and that the Executive Council, sitting as a Land Court, was fully competent to come to the decision now complained of, my answer, to that argument, would be as plain as satisfactory.

The enactment of the Civil Code, (Art 644) is posterior in date, 1o. to the Ordinance of retrocession, by the French East India Company to the King of France; 2o to the two Ordinances of the King Lewis of France dated the 25th September 1766.

But if, on the one hand, the King of France, at the date of those Ordinances, was absolute owner of our Colonial waters, on the other hand, his successor, on the French throne, divested the Crown of France of that ownership by the enactment of Art. 644, (Civil Code) which had been published in this Island when the latter was ceded to England. The Civil Code formed part and parcel of those laws of the Island which, by the Capitulation of 1810, the English Crown undertook should continue in full force and vigour, the English Crown cannot therefore have succeeded to the rights of King Lewis of France, except as abridged and curtailed by Art. 644 of the Civil Code. If so, the Executive Council, as a Land Court, has no power of disposing of the right of Defendant to the use of 1|2 of the water of the Stream "Rivière Sèche" without and against the will of Defendant.

Be it so, it might be said, but then what becomes of the Land Court, of what earthly use can it be? Its jurisdiction, though considerably reduced, is still of very great importance in regulating the use of the waters by and amongst borderers and in apportioning to them the *quantum* of water required by them respectively, according to the rules laid down in the Ordinances of the 25th September 1766, which are in no wise affected by the contrary enactment of Art. 644 of the Civil Code, as to the ownership of the Colonial waters.

It has been urged that if the Judgment of of the Land Court were bad, it was the Defendant's bounden duty to take the necessary steps to have it set aside, whether by motion to the Land Court, for a revision of its Decision, or by an Appeal from the Decree to Her Majesty in Her Privy Council. That neither of these steps having been taken, the Judgment has therefore become final and must be upholden by this Court.

But such is not the rule of law, and it is clearly laid down, in the following authorities, that the Judgment given by an incompetent Court, if given in evidence, in support of a demand before another Court, it is incumbent upon this Court to inquire to the legality or illegality of the Decision put in, and in case of illegality of such judgment not to allow the same in evidence.

(Art. 645. C. C. SIR. 1840. 1. 451—1838. 1. 401—1839. 1. 815.)

On the merits, said the learned Counsel, the damages alleged not having been proved, the Plaintiff's demand must be dismissed with costs.

JUDGMENT.

Looking at the attributes of the Land Court, as fixed by the legislation of the Island, it appears to us that all that was done by that Tribunal was within its competency. But assuming, for the sake of argument, that the Executive Council, sitting as a Land Court, had no jurisdiction to adjudicate, as it did, upon the subject matter of Sicard's Petition, and to deprive the Defendant of his right to the half of the water of the " Rivière Sèche, " by temporarily allowing the continuance of the dam right across the river, from bank to bank, it clearly appears to the Court that, by the Colonial Law, the Defendant was, in no wise, warranted in the use of the several means resorted to, by him for the protection of his alleged rights. He should have availed himself of the remedy presented to him by the Judgment of the Land Court. He should have moved the Land Court, in the very words of its judgment, that the temporary grant to Sicard be cancelled, or in any wise so altered as to do away with the grievance complained of by Defendant. This would have rendered unnecessary the Injunction issued by this Court, and prevented the several law suits to which he has been subjected by his disregard of the legal remedies at his command.

The remedy setforth in the Judgment of the Land Court is still within the reach of Defendant. This Judgment limits, in no wise, the time within which any interested party is to make the motion for cancelling or altering the temporary grant to Sicard the Plaintiff.

But whether or not the Defendant is to make such motion, is a matter for the Defendant's sole consideration.

Our attention is to be confined to the only questions left to the determination of the Court:

1o. Whether Plaintiff has or has not sustained any damage from the acts and deeds of Defendant, and 2o. What is the amount of the damage sustained, if any.

That damage has been sustained by the Plaintiff is certain. But to what precise amount it is not so easy to determine.

After a careful review of the evidence, on both sides, we think that an award of £ 400 will meet the justice of the case. To this amount the Court therefore limits the damages claimed, with arrrest in execution not to exceed 3 years. Costs to the Plaintiff.

Supreme Court.

COURS D'EAU,—BARRAGE,— RIVERAINS, — TRIBUNAL TERRIER,—COMPÉTENCE ET ATTRIBUTIONS DE CE TRIBUNAL,—ART. 644 DU C. C.

RUN OF WATER, — DAM, — BORDERERS OF RIVERS AND CANALS,—LAND COURT,—JURISDICTION AND POWERS OF THE LAND COURT,—ART. 644. OF THE C. C.

Number of Record: 7786

GOBLET AND ANOR,—Plaintiffs
versus
WIDOW VIADER,—Defendant.

Before,
His Honor the CHIEF JUDGE and
The Honorable N. G. BESTEL 2d P. J.

E. LECLÉZIO SR.,—of Counsel for Plaintiffs.
E. LAURENT,—Plaintiffs' Attorney.
G. B. COLIN,—of Counsel for Defendant.
E. CASTELLAN,—Defendant's Attorney.

23rd December 1862.

This is an action in damages, by the Plaintiffs against the Defendant, for certain wrongs alleged to have been sustained by them, from her act and deed, as set forth in the Declaration, in the following words:

" Whereas the Plaintiffs, before and at the " time of the prejudice and damage caused to " them, as hereinafter stated, had made large " sugar cane plantations on a landed proper- " ty called *Husard*, admeasuring one hundred " and fifty six acres and a quarter, owned by " them (Plaintiffs) in the District of Black " River; and such said sugar cane planta- " tions were, before and up to the time " of the prejudice and damage complain- " ed of, well and easily irrigated by the " water coming from a River called *Rivière* " *Belle Ile*, passing across and through their " said landed property, which said water the " said Plaintiffs, as borderers of the said River, " are entitled to, and had always, before and " up to the time of the said prejudice and " damage, peacefully used and enjoyed.

" Whereas, since on or about the month of " July 1861, you, the said Defendant, have " unjustly and illegally, and without any right, " title or capacity, and to the great loss, pre- " judice and damage of the said Plaintiffs, " caused a dam to be constructed across the " said River called *Rivière Belle Ile*, on " the upper part thereof, to wit: on its " passage through your Sugar Estate, si- " tuate in the said District of Black " River, and known under the name of " *Belle Ile*, in order to turn of and divert the " water thereof, thereby unjustly, and illegally " enjoying, since the aforesaid month of July " or thereabouts, and up to this day, almo-t " all the water flowing in the said River, for

" the irrigation of your sugar cane plantations " and for the other use and benefit of your " said sugar Estate " *Belle Ile.*"

" Whereas, since and by the existence of " the aforesaid dam, the stream of the said " River called *Rivière Belle Ile,* being " considerably lowered, part of the Plaintiffs' " aforessaid plantations, to wit: about 40 " acres of sugar canes, planted by them " on their said property called "*Hasard,*" " which is situated beneath your said Su- " gar Estate called " *Belle Ile,*" being depri- " ved of the water of the said River cal- " led *Rivière Belle Ile,* have perished or " suffered considerably, to the great loss, " prejudice and damage of the said Plaintiffs, " to the amount of £1000.

" Therefore an action hath accrued to the "said Plaintiffs to have and demand from the " Court that the Defendant be condemned to " pay them the aforesaid principal sum of " £1000 damage, with interest thereon, and " all costs of suit, and that the aforesaid dam " be broken down and destroyed, at your own " expenses, within 24 hours from the Rule or " Judgment to be given in this cause. "

This Declaratien is traversed, in its integrality. The wrong alleged is denied, the damages claimed by reason thereof are said not to be due.

At the trial, many witnesses were heard, on both sides, in support of their respective allegations, and, on the argument. Leclézio, of Counsel for the Plaintiffs, rested his whole case on the enactment of Article 644 of the Civil Code, the applicability of which, to the issue between parties, has been denied by G. B. Colin of Counsel for the Defendant.

" Article 644. C. C. is thus worded : " Celui " dont la propriété borde une eau courante, " autre que celle quiest déclarée dépendancedu " domaine public par l'Art 538, au titre de la " distinction des biens, peut s'en servir, à son " passage, pour l'irrigation de ses propriété- " tés.—Celui dont cette eau traverse l'héritage " peut même en user, dans l'intervalle qu'elle " y parcourt, mais à la charge de la rendre, à " la sortie de ses fonds, à son cours ordinaire. "

Hence, was it argued, by Leclézio, the Defendant, as a borderer of the River *Belle Ile,* has an equal undoubted right, with Plaintiffs, to the enjoyment of the waters of that River. But use must be carefully distinguished from abuse; that the Defendant had a right to avail herself of the water in question, for the irrigation of her land and crop, is conceded ; but that she should absorb the whole of the water for such purpose is denied. The law and equity of the case require that each borderer should take, for his household and agricultural purposes, that quantity of water only which can be obtained without draining the River, taking care to leave, in the River, that *quantum* of water reasonably required, by the under borderers, for similar purposes, and to which they are legally and equitably entitled. The violation, in this case, of the rule laid down, by Defendant, had caused, to the Plaintiffs, the loss complained of, in compensation of which they now claim the pecuniary reparation prayed for in the Declaration. The evidence, in proof of the wrong done, supplies the Court with proof of the damage sustained.

The answer of the Defendant is this: The Article of the Civil Code, upon which the learned counsel rests his case, is altogether inapplicable to the issue before the Court.

If the whole of our waters, in this Colony, contrarily to the law in France, England, &a., be Crown property, no one has a right to the smallest share thereof, without a special grant from the Crown, and in the present case, no such grant has been made to any of the borderers. In support of that proposition, (viz:) the ownership of the colonial waters being in the Crown, reference was made to the retrocession, by the French East India Company, to Louis, the then king of France, whose rights, it is said, necessarily devolved on king George III, on the change of sovereignty in 1810.

Reference was also made to the Ordinance of King Louis, of France, after the retrocession, to him, made of the Island, by the French East India Comany, of the 25th September 1766, (Code de l'Ile de France. Delaleu, No. 96, Page 141.) establishing, in this Island, a Land Court, whose powers are embodied in the "Titre II", under the head of "Compétence du Tribunal Terrier," the second Article of which Charter runs thus :

" Il appartiendra au Tribunal Terrier d'or- " donner de la *saignée* des *Rivières,* pour l'*ar-* " *rosage* des terres, de la collocation des terres " dans la distribution des eaux de ces rivières, " de la quantité d'eau appartenant à chaque " terre, de la manière de jouir de ces eaux, " des servitudes et placemens de travaux, pour " la conduite et le passage des eaux, et des " demandes en réparations et entretien des " dits travaux et passages.

. . . . . .

" Art. 6 — Connaitront les Conseils Supé- "rieurs des servitudes *autres* que les servitudes " pour le *passage* et la conduite des *eaux* " *d'arrosage.*"

Another Ordinance of the same date, (Code de l'Ile de France. Delaleu No. 2 Page 3.) on the general administration of this Island, was quoted in favor of the same proposition, wherein it is provided that : " En ce qui concerne " les saignemens des rivières, ou la distribution " des eaux, les règlemens ne pourront être " faits que par les dits *Gouverneurs* et Inten-

" dants, conjointement." Reference was also made to Ordinance No. 13 of 1832, whereby it is enacted that the Land Court, established under the Ordinance of 25th Septembre 1766, by Art 3 of the Arrêté of the 3rd Germinal year 11, and the Proclamation of the 31st March 1811, was abolished. (Article 1.) But it is enacted by the same Ordinance, that : " All " Petitions and disputed causes, which were of " the competence of the Land Court, as also " all matters purely administrative, shall be " brought before the Executive Council of " Government, which may send before the " ordinary Tribunals all disputes, within its " competency, which it shall please to deter- " mine. (Art 2.)

The reason assigned for the abolition of the Land Court is thus stated in the Preamble of the Ordinance : " Whereas the circumstances " which rendered it necessary to establish a " Land Court in the Colony, with its special " attributions as regulated by the Ordinance " of 25th. September 1766, and the Arrêté of " the French Government of 3rd. Germinal " year 11, no longer exist ; and whereas the " matters which are of the competency of this " Court, are for the most part, as well as all " those relating to the public Domain, purely " cognizable by the administrative authority."

Thus, and for the reasons assigned by the lawgiver, have the powers formerly vested in the Land Court been transferred to the Executive Council which is the continuation of the Old Land Court, and as such having exclusive jurisdiction over the same subject matters mentioned in the 2nd Article, Title II of Ordinance of 25th September 1766 above quoted, which may be read as follows : " Il " appartiendra au Conseil Exécutif(siégeant en " tribunal Terrier) d'ordonner de la saignée "des rivières pour l'arrosage des terres &a.&a."

If the ownership of the Colonial waters, rivers or canals, be in the Crown, as asserted, it is evident that the absence of any grant to the part of the Crown, necessarily precludes the application of the Article of the Civil Code quoted in favor of the Plaintiffs. But, for the reasons urged in the case of *Sicard and Lemerle*, I deny the ownership of the Colonial waters being in the Crown. That ownership had ceased to exist, and the borderer is, by Art. 644 of the Civil Code, entitled on making due application to the proper authority for the use of the share of the water bordering his land.

Until the competent authority have determined whether the water of the *Belle Ile* River shall be distributed to the borderers of that River, and apportioned the volume of water to which they may be respectively entitled, a complaint urged against Defendant for an abuse of her share in the water cannot be sustained. Abuse, in this instance, necessarily implies an encroachment upon the legal right or quantity of water to the exclusive enjoyment of which Plaintiffs are entitled. But that quantity of water has never been determined by the competent authority. If so no encroachment can be said to have been made upon the right of Plaintiffs, and no damages can be claimed and awarded as compensation except it be upon the violation of a legal right. In the absence of any such right, there can exist no wrong in law, and whithout legal wrong no damages can have been caused or sustained, and compensation cannot be and is not due. This is consistant with the established jurisprudence of the Colony. (BRUZEAUD'S Reports of 1842 to 1845) Volume 2, Page 84. *Changeur vs. Grandsire and Jaubert.*

As far as the Court had been able to ascertain from the observations of Counsel and our own individual researches, what the state of the law is, with reference to the waters of Rivers and Canals in this Island, these waters appeared to have been originally the exclusive and private property of the King of France. Of course the right of the French King must have vested in the King of England, on the change of dominion in 1810.

How far the right of the Sovereign was modified by the promulgation of the Civil Code in this Island, on 24th Vendemiaire An XIV, that is, on 16th October 1805, appears to be a question of difficulty, and counsel not having in this case directed their argument specially to this vital point, the Court was desirous that their attention, as well as that of His Majesty's Procureur and Advocate General should be called to it, so that after full discussion the Court should be in a position to give a Judgment which might set at rest this long vexed question

But on the trial of another water suit, (viz : *Sicard vs. Lemerle*) the question, reserved for argument in this case, was gone into, and counsel in this case, and on the conclusions of J. Colin, as Crown Counsel, stated that he had nothing to add to the arguments urged by Douglas and G. Colin in the case of *Sicard and Lemerle*. The Court now proceeds to deliver its Judgment :

JUDGMENT.

Whatever the precise rights of property in water in this Colony may be, as in the present case, no share of water having been assigned by the only competent authority known in our Colonial law for that purpose, it appears to us impossible to sustain the allegation of the wrong complained. A wrong, in law, is the deprivation of the enjoyment of a legal right. In the absence of any such legal right, such deprivation cannot possibly exist in law. In the absence of any legal wrong, no action can lie for compensation.

This action must therefore be and is accordingly dismissed ; as however this appears to be the first time the question, at least in its broader aspects, has been raised before the Court, no costs are given.

After the two important cases, just reported, of *Sicard vs. Lemerle* and *Goblet vs. Viader*, we have thought it of some importance to our subscribers to insert in this publication a judgment given by the Land Court, in 1860, in the case of *Chauvin vs. Lepoigneur*, and which contains a full and complete review, by the Queen's Attorney before the Land Court of this Colony, of the powers and jurisdiction of this Tribunal.

Land Court.

COMPÉTENCE ET ATTRIBUTIONS DU TRIBUNAL TERRIER,—COURS D'EAU.

POWERS AND JURISDICTION OF THE LAND COURT,—RUNS OF WATER.

LEPOIGNEUR,—Plaintiff.
versus
CHAUVIN,—Defendant,

Before,
The EXECUTIVE COUNCIL sitting as a LAND COURT and composed of:

His Excellency W. STEVENSON,—Governor.
The Honorable H. W. BRETON,—Officer in command of the troops.
The Honorable F. BEDINGFELD,— Colonial Secretary.
The Honorable W. G. DICKSON,—Procureur and Advocate General.
See Vol. 1. *Pages* 30 *and* 108.

[Extract from the "Minutes of the Proceedings of the Executive Council, sitting as a Land Court, at the Government House, on Friday the 17th day of August 1860." No. 7 of 1860.]

Lepoigneur vs. Chauvin.

.....

The Queen's Attorney then gave the following conclusions to the Court:

In this case, Elphèse Lepoigneur has presented a Petition to the Executive Council, sitting as a Land Court, in which he alleges the following facts, viz:

That he is owner of an immoveable proty, situate at "*Petite Rivière*," by him purchased in the year 1847 of one Françoise Fanny Jacques. That, with the said property, the petitioner purchased, from his vendor, a share of water of the River "*Belle Eau*," of 9 inches diameter. That, on taking possession of the said property, Petitioner found a canal, which springs from the "*Belle Eau*" River, crosses the properties of several other persons and leads the water on his said property. That, in the year 1858, Henry Chauvin the father, the proprietor of the neighbouring Estate "*Albion*," summoned Petitioner to cause the said Canal to be shut; that Petitioner not having complied with the summons, Chauvin entered an action, before the Supreme Court, against Petitioner, who was, by the said Court, condemned to cause the said Canal to be shut, and to pay Chauvin $6,400, by way of damages, together with costs of suit.

That, in execution of the above judgment, Chauvin caused the canal to be shut, thereby totally depriving of water the Petitioner and the other parties deriving water from the River *Belle Eau* by means of the said canal. That Chauvin has constructed works whereby the whole of the water of the river *Belle Eau* is diverted on to his property *Albion*. That, according to his title deeds, produced before the Supreme Court in the above mentioned action, Chauvin, as owner of the *Albion* estate, is only entitled to a quantity of water, from the river *Belle Eau*, sufficient to turn a coton mill. That Chauvin, being also owner of a neighbouring estate, called *Belle Vue*, has caused works to be made upon the River *Belle Eau*, whereby a large quantity of the water of the River is sent on his said estate *Belle Vue*.

The Petition concluded by a prayer that the Land Court would order the Government Surveyor to examine the said River *Belle Eau* (of which Petitioner stated himself to be a co-borderer), and to fix the quantity of water to which every co-borderer is entitled.

By a supplementary Petition, presented with a view of further explaining the subject of his demand, Lepoigneur stated that his Estate has a right to a share of water from a canal bringing water from the River *Belle Eau*, to the estate *Belle Vue*, (being another and different canal from the canal referred to and described in his previous Petition,) but that, by agreement under a *sousseing-privé*, dated the 20th November 1846, made between Miss Fanny Jacques, the then proprietress of Petitioners' Estate, and Mme Delaunay, the then proprietress of *Belle Vue*, Mme Delaunay abandoned to Miss Fanny Jacques 9 inches of the water derived from the River, by the said canal of "*Belle Vue*," on condition that Miss Fanny Jacques, instead of taking, as theretofore, her water from the said canal, should take the 9 inches abandoned to her from the River "*Belle Eau*," the *prise d'eau* of the canal of *Belle Vue* being *pro tanto* diminished. The Petitioner, therefore, in his capacity of proprietor of 9 inches of water in question, prayed the Land Court to allow him to take, from the River *Belle Eau*, the 9 inches of water belonging to him, the water conveyed on to the "*Belle Vue*" Estate being *pro tanto* diminished, and, in his capacity of borderer of the river "*Belle Eau*," he further prayed for a grant of such share of water of the said River as shall be found reasonable with regard to the wants of his Estate.

Upon reading the above two Petitions, the Land Court, by the usual interlocutory De-

cree, ordered that such Petitions be served upon Chauvin, who should be called upon, within 15 days after service, to sent in to the Registrar of the Land Court, any objections which he might have to the granting of such Petitions, together with any evidence, by title deeds or otherwise, which he might have to produce in support of his objections or of his own title.

In compliance with such Decree, Chauvin sent in his objections, which are to the following effect:

1st.— That the Land Court has no jurisdiction on the matter.

2nd.—That Lepoigneur has no *locus standi* before the Land Court, in respect of the subject matter of his Petitions. That, in his capacity of borderer of the River "*Belle Eau*," he asks from the Land Court a concession of a share of water; whereas the Land Court has no power to grant such concession. That, according to the *Arrêté* of the 23*rd Messidor An XIII* (Code Decaen) the Land Court can only take cognizance of contestations relative to the mode of enjoyment of waters legally distributed, or in other words, that the Petitioner, in order to have a *locus standi* before the Court, ought to produce a title deed shewing that he has acquired a legal right, by previous distribution, to a share of water. That, according to the above *Arrêté*, the proper authority to make legal distribution of water is the *Préfet Colonial*, or the authority now exercising his functions, but that the Land Court has no jurisdiction in such matters.

3rd.—That Lepoigneur's vendor sold to him a share of water to which she had no right whatever, and that the *Sous seing privé* between her and Mrs. Delaunay has become void, according to the terms thereof, for non-execution.

4th.—That Chauvin ought to be maintained in the undisturbed enjoyment of the waters now taken by him from the River, having acquired a right thereto, 1st. by prescription, 2dly under a grant of the Land Court, dating so far back as the year 1776, and made with the consent of all the lower borderers of the river *Belle Eau*, including the then owner of Lepoigneur's estate.

In his reply to the above observations, Lapoigneur explained that he did not contest Chauvin's right to the quantity of water granted to him, under the grant of the Land Court of the year 1766, but that he contented that Chauvin ought now to be restricted, in conformity with the terms of such grant, to such quantity or water as would be necessary "for the turning of a cotton mill," such quantity to be determined by the competent officer.

The Court having taken into consideration the respective pretentions of the parties, as supported by the documentary evidence produced on eitherside, and having also taken into consideration the application of the parties that they should be heard by Counsel, was pleased to order that the parties be heard by Counsel upon the following points, viz:

1st.—Whether the Executive Council, sitting as a Land Court, has jurisdiction over the subject matter of Lepoigneur's demand.

2nd.—Assuming the Council to have such jurisdiction, whether the claim of Lepoigneur, as one of the borderers of the river *Belle Eau*, to have a share of the water of the said River apportioned to him, is well founded.

3rd.—Assuming as above, whether Lepoigneur has any right to claim from Chauvin, as proprietor of the *Belle Vue* estate, any, and if any, what portion of the water of the river *Belle Eau* at present conveyed upon the said Estate by means of the canal *Belle Vue*.

4th.—Whether Chauvin has a right to divert from the River *Belle Eau* a greater quantity of water than such amount as may be fixed by the Executive Council, regard being had to the original concession of water to Chauvin's predecessor, Seligny, under date the 11th January 1776.

The parties accordingly appeared by Counsel and the Court was pleased to direct that the first point, viz; the question of jurisdiction, should be in the first instance argued. This was accordingly done, and the Court, in directing the learned Counsel, on both sides, to proceed with their arguments upon the merits, intimated that judgment would be given, at a later period, upon the questions submitted for the decision of the Court.

Upon the question of jurisdiction it was contended, on behalf of Chauvin, that the Executive Council, sitting as a Land Court, has no jurisdiction over the subject matter of Lepoigneur's Petition, upon the two following grounds:

1st.—That the powers and attributions of the Land Court, as at present constituted, are purely administrative.

2nd.—That assuming any judicial powers to be inherent in the Land Court, such powers are limited to contestations affecting the "*Jus Publicum*," and do not extend to disputes or questions arising *inter partes*, where private rights merely are involved, such cases being within the exclusive jurisdiction of the ordinary Courts of law.

(It may be observed, in passing, that the above grounds of objection are diametrically the opposite of those propounded by Chauvin in his objections filed against Lepoigneur's

Petition. In these latter Chauvin has contended that the powers and attributes of the Land Court are, at the present day, purely judicial.)

In support of the above propositions it was sought to establish an analogy between the law of France, and the law of his Colony. It was contended that the jurisdiction of the Land Court, in questions of water, is merely co-extensive with that of the *Conseils de Préfecture* in France, and that wherever the ordinary Tribunals, in France, would have jurisdiction, the Courts of Law, in this Colony, would equally have jurisdiction; and various decisions of the Courts of law, in France, were cited and relied upon, with a view to determine the line of demarcation between the jurisdiction of the Land Court, and that of the ordinary Courts of Law.

I am of opinion that no such anology exist, as has been contented, consequently that the French Decisions, relied upon, are of no authority.

The Tribunal Terrier, or Land Court, is a special Tribunal, of a limited jurisdiction, crea, ted exclusively for this Colony and Réunion. by Royal Ordinances which, subject to any modifications which may have been made by subsequent local Ordinances, clearly define its powers and attributes and its jurisdiction as distinguished from that of the ordinary Courts of Law. In none of these laws is any reference made to the law of France, and indeed the circumstances of these two islands, at the time the Tribunal Terrier was established, were so totally different from those of the mother country, that the laws of the latter would have been inapplicable to the primitive condition of the former. In France, feudal system still prevailed; there "Seigneurial" Courts still exercised a limited jurisdiction in questions of water; the right of selling concessions of water of non navigable rivers was one of "Seigneurial" rights of the Lord through whose *domaine* such waters flowed. In the Island, originally the property of a trading Company, and by them sold to the French Government, the fundal system had never existed, and "Seigneurial" right were unknown.

This change of ownership took place in July 1767, when these Island were formally taken possession of by Dumas and Poivre, on behalf of the French Crown. In anticipation of the transfer, various Royal Ordinances had been passed, regulating the Government and administration of the two Islands. Amongst others, two Ordinances of the 25th September 1766, (numbered respectively 3 and 96 of the Code Delaleu,) under which the Tribunal Terrier derives its constitution.

According to the latter of these two Ordinances, Title 2, Art. 2, the jurisdiction of the *Tribunal Terrier*, touching questions of water, is thus defined:

"Il appartiendra au Tribunal Terrier d'or-
"donner de la saignée des rivières pour
"l'arrosage des terres, de la collocation des
"terres dans la distribution des eaux de ces
"rivières, de la quantité d'eau appartenant à
"chaque terre, de la manière de jouir de ces
"eaux, des servitudes et placements de travaux
"pour la conduite et le passage des eaux, et
"des demandes en réparations et entretien
"des dits travaux et passages.

And, in the former of these Ordinances, under the head: *De la justice*. Art. 42, is the following provision:

"Ne pourront les Conseils supérieurs con-
"naître des *clauses* de concessions, réunions
"au domaine, *distribution d'eau pour l'arrosa-*
"*ge des terres*, des servitudes, des chemins,
"ponts, aqueducs, chasse, pêche sur les côtes
"et dans les rivières; la connaissance en ap-
"partiendra au Tribunal Terrier, dans lequel
"il sera procédé, dans la forme et de la ma-
"nière marquée dans l Ordonnance de ce jour,
"qui fixe la composition de ce Tribunal."

The Ordinance first above cited may be said to define the administrative, and the Ordinance last cited the judicial functions of the *Tribunal Terrier*.

At the time of the French Revolution the Government of this Island was entirely remodelled by the *Arrêté* of the 13th Pluviose An XI. Thereby, amongst other functionaries, a *Préfet Colonial* was instituted, and by Art. 14, which enumerates and defines his functions, it is provided as follows:

"Le préfet Colonial est chargé, exclusive-
"ment, à l'Ile de France, de l'Administration
"Civile et de la haute Police de la Colonie,
"ce qui comprend... la distribution d'eau."

It would appear, however, that, owing to the wording of a subsequent *Arrêté*, of 22 *Nivose An XIII*, relating to Canals, some doubts arose as to the respective attributes of the "*Préfet Colonial*," and of the *Tribunal Terrier*, relative to questions of water, for an explanatory *Arrêté* of 23 *Messidor An XIII* was passed, whereby, after reciting: qu'une
"fausse interprétation de l'Arrêté du 22 Ni-
"vose dernier, relatif aux canaux de l'Ile de
"France, peut engager les habitants de cette
"Colonie dans des actions dispendieuses et
"inutiles près le Tribunal Terrier; *que les*
"*distributions d'eau appartenant exclusive-*
"*ment au Préfet Colonial*, d'après le texte de
"l'Article 14 de l'Arrêté du Gouvernement
"du 13 Pluviose An XI, *le dit Tribunal doit*
"*connaître seulement des contestations* nées
"*sur la manière de jouir des eaux légalement*
"*distribuées*; que l'Arrêté du 22 Nivose

" ayant été conçu dans ce sens, il est nécessai-
" re de donner quelques explications propres
" à fixer la compétence respective des autori-
"tés,etc."

It is provided that demands for concessions of water shall be made to the *Préfet Colonial* upon the authorization of whom the deed of concession shall issue. (See Art. 2.)

It appears, therefore, that by the *Arrêté* of *Pluviose An XI*, cited, the *Préfet Colonial* became, as regards questions of water, invested with all the administrative powers of the *Tribunal Terrier*, whose functions, in such matters, thenceforth became exclusively judicial. It is important to observe that the words are general: " le dit Tribunal doit connaître " seulement des contestations nées etc.," without distinguishing between contestations involving the *Jus Publicum*, and those involving purely the rights of private parties.

Passing over the Proclamation of the 31st March 1811, which merely maintained the *Tribunal Terrier*, upon the capture of this Island, with some important modifications, the only remaining law which affects the question of the present jurisdiction of the Land Court, is Ordinance 13 of 1832, whereby, after reciting:

" Attendu que les circonstances qui ont
" nécessité la création d'un Tribunal Terrier
" dans la colonie, et son organisation particu-
" lière, ainsi quil est réglé par l'Ordonnance
" du 25 Septembre 1766, et l'Arrêté du Gou-
" vernement français du 3 Germinal an XI,
" ne sont plus les mêmes, et que les affaires
" qui étaient de la compétence de ce Tribunal
" sont, pour la plupart, comme toutes celles
" qui concernent le domaine public, du ressort
" de l'autorité administrative. "

Article First abolishes the *Tribunal Terrier*, and Art. Second provides as follows: " Toutes
" demandes et contestations qui étaient de la
" compétence du Tribunal Terrier, ainsi que
" les matières purement administratives, se-
" ront portées devant le Conseil Exécutif du
" Gouvernement, qui pourra renvoyer, devant
" les Tribunaux ordinaires, toutes contesta-
" tions qu'il ne lui conviendra pas de retenir."

While therefore, prior to the passing of this Ordinance, and after the abolition of the office of *Préfet Colonial*, there might have been a question whether there was any authority, in this Island, competent to exercise the administrative functions vested in the *Préfet Colonial*, to the exclusion of tha *Tribunal Terrier*, all doubt has been set at rest, by this Ordinance, which vests in the Executive Council, sitting as a Land Court, all the attributes, judicial or other, of the *Tribunal Terrier*, as well as the administrative attributes formerly exercised by the *Préfet Colonial*.

It only remains to notice. Art. 6 of Ordinance 34 of 1852, under which it has been contended that the Supreme Court, to the exclusion of the Land Court, has now jurisdiction to adjudicate upon disputed rights to water.

A perusal of this Article is sufficient to shew that nothing therein, either expressly or by implication, ousts the Land Court of any portion of its jurisdiction, and that, if stretched to its utmost extent, an extent to which I am not prepared to go, this Article would merely give concurrent jurisdiction to the Supreme Court in such matters.

I am therefore of opinion that the jurisdiction of the Executive Council, sitting as a Land Court, is co-extensive with that of the *Tribunal Terrier*, as defined by the Royal Ordinances of 1766, above quoted, such jurisdiction being both administrative and judicial. That the Land Court has power to hear and determine contestations relative to rights of water, not only where the " *Jus Publicum* " is involved, but also where the rights of private parties alone are at issue, provided such questions involve the interpretation of title deeds, or concessions, emanating from the administrative authority. But that, where such contestations arise upon contracts or title deeds, made *inter parties*, and not emanating from the administrative authority, the ordinary Courts of Law have exclusive jurisdiction. To illustrate the distinction I would say that if the Land Court were to grant a concession of water to A. B, and contestations were subsequently to arise, between him and a co riverain, in which the nature and extent of this grant, or the mode of enjoyment thereof would be at issue, such a contestation would be of the exclusive competency of the Laud Court. But if A. B., after having obtained a concession of water, were to sell by contract, to C. D., a portion of the water so granted, and subsequently contestations were to arise between A. B. and C. D., involving the right of C. D. to water, under such contract of sale, in such case the ordinary Courts of Law would have exclusive jurisdiction.

A fortiori, I would say that if A, being in the *de facto* enjoyment of water, which had never legally been distributed or granted to him by the Land Court, were to sell a share of such water to B., and contestations were subsequently to arise between A. and B., involving the right of B. to the water so sold to him, in such case also the ordinary Courts of Law would have exclusive jurisdiction,

Applying the above tests to the subject matter of Lepoigneur's Petition we find as follows Lepoigneur asks two things:

1st.—To have a share of water of the River " *Belle Eau* " allotted to him, in his capacity of borderer of that River.

2ndly. That effect should be given to the provisions of an agreement entered into between Fanny Jacques the former owner of this Estate, and Mad. Delaunay the former owner of Chauvins' Estate "Belle Vue" whereby the latter abandoned to the former 9 inches of the water which she derived from the River " Belle Eau " by means of a canal called the " Belle Vue Canal."

This Canal appears, from the plans and title deeds produced before the Court, to have been in existence for many years, but there is no proof of its having been constructed, in the first instance, with the sanction of the proper administrative authority; on the contrary it would seem to be admitted, on both sides, that the Canal was, in its origin, an unauthorized *saignée*, made in the River "*Belle Eau*," by the proprietors of the "*Belle Vue*," Estate, the water derive therefrom being shared between that Estate and various other properties traversed thereby, amongst which is the property now owned by Lepoigneur.

Lepoigneur asks this Court to give effect to the above agreement, whereby Mad. Delaunay abandoned to Miss Fanny Jacques nine inches of water of the canal "Belle Vue," the condition of such abandonment being that Miss Fanny Jacques should, for the future, cease to take any part of the water of the Canal *Belle Vue* and should take her nine inches of water from the River itself, the prise of the Canal being reduced to 9 inches. It is possible that such an agreement, if carried into effect, might in no way prejudice the rights of the other borderers of this River. But is this an agreement to which this Court can give effect? Is it not an agreement to which, as regards the rights of third parties this Court would entirely ignore? Admitting that a borderer of a River may, without the sanction of the Land Court, make a *saignée* of the River, for the benefit of his property, and that he may continue to derive water from the River thereby, without restriction so long as his co-borderers do not object, it is nevertheless clear law that the moment his co-borderers do object, and that they, or any of them, claim the intervention of the Land Court, for the purpose of making an equitable distribution amongst them of the water of the River, the borderer must submit to have his share of water reduced to such extent as the Land Court may consider equitable, regard being had to the wants of the other borderers.

No period of use, however lengthened, could confer a prescription right to the water taken by such a *saignée*, nor could the borderer, by any form of agreement, alienate to a third party, in a manner binding upon other borderers or upon the public, any portion of the water so taken. Assuming therefore that, under any circumstances, this Court could have jurisdiction to give effect to such an agreement, (a question which it is unnecessary at present to decide,) it is quite clear that the Court would have no jurisdiction to do so, when, as in the present case, the parties are to issue upon the preliminary question, whether such an agreement is now existing, and binding between them. The only tribunal competent to decide this question is the Supreme Court and not the Land Court.

For these reasons, I am of opinion that this Court has jurisdiction to entertain the first of Lepoigneurs' above demands, viz: the grant of a share of water to him, from the River *Belle Eau*, in his capacity of borderer of such River.

But that this Court cannot entertain the second of his demands, viz: that this Court should give effect to the provisions of the agreement above mentioned under which he claims nine inches of water of the said River, for the benefit of his Estate, such quantity to be taken in deduction of the quantity of water now enjoyed by the *Belle Vue* Estate.

This disposes the questions raised by the 1st and 3rd of the points for argument.

Upon the fourth point it was contended, on behalf of Chauvin, that he, as proprietor of the "*Albion*" Estate, has a right to the enjoyment of the waters of the River "*Belle Eau*," for the benefit of that Estate, beyond the limits of his original grant, and to the full extent of the capacity and contents of his present *prise d'eau*.

He rests his case upon the following state of facts, which are undisputed.

On the 8th September 1775, Seligny (under whom Chauvin derives title) petitioned the *Tribunal Terrier*, setting forth that, in times of draught, he had no sufficient water, from the spring upon his property, to turn his water mill, and that below the land belonging to Frichot, and after and below the Establishment of "Launay," the River "*Belle Eau*" was so much confined *(encaissée)* that until the River lost itself in the *Marre* called "*Petite Rivière*," the waters thereof were of no use to any one; that besides this, below the spot where he proposed to take his *prise d'eau*, there was but one portion of land with a high bank, *(terrain escarpé,)* belonging to "Launay," the remaining lands, to right and left of the river being of him Seligny.—He therefore prayed for permission to make the necessary works for the conduct of the water to his mill. This Petition was referred to the *Procureur du Roi du Tribunal Terrier*, who reported favorably thereon, in the interest of the Colony, stating that no body could be

prejudiced thereby except Madame Launay. Thereupon the *Tribunal Terrier*, by Judgment under date 11th January 1776, upon reading the above Petition, the Report of the *Procureur du Roi*, and also a letter written by Madame Launay, whereby she consented to the prise d'eau being made below her "*établissement*," permitted and authorized Seligny to bleed the River "*Belle Eau*," and to take therefrom the water necessary for the service of his cotton mill, in conformity with the plan therein referred to.

This plan is produced by Chauvin, and it appears that, in point of fact, at that time, no body except Launay could have objected to the demand of Seligny, as, with the exception of Launays' property, the whole of the Land, from above the spot where the proposed prise d'eau was to be constructed, belonged, on both sides of the river, to Seligny. It is an admitted fact that the proposed *prise d'eau* was thereupon constructed, and has continued in existence up to the present time.

It does not appear clearly, from the title deeds produced, nor have I been able to ascertain whether the land, now the property of Lepoigneur, was at the date of the above grant of water, the property of Launay, or whether it formed a portion of Seligny's property. For the purposes of this case it is immaterial to solve this doubt, it having no influence one way or the other upon the matter at issue.

These being the facts of the case, Chauvin lays claims to the unrestricted enjoyment of any quantity of water, which can be taken from the River "*Belle Eau*" by the above *prise d'eau*; he claims it upon two-fold grounds.

1st—By the above grant coupled with prescriptive user.

2nd—By the above grant coupled with estoppel.

As regards the first ground, he contends that Seligny, having in 1776 obtained a grant of water undefined in quantity, being, in terms, such quantity as may be necessary for the exigencies of a cotton mill, and the successive owners of the *Albion* Estate having, from that time to the present, taken water from the river without reference to the exigencies of such mill, and in quantity merely limited by the capacity and content of the canal conveying the water, he, Chauvin, as owner of this Estate, has now acquired a prescriptive right to all the water which the Canal can contain, and that consequently he is not restricted to such quantity of water as, by the terms of the Judgment of the *Tribunal Terrier* above cited, Seligny was authorized to take.

In support of such prescriptive right, Chauvin has cited Articles 641 and 642 of the Civil Code. It will however be observed that these Articles apply, in terms, to springs of water, which are, *primâ facie*, the private property of the owner of the soil in which they derive their sources.

Assuming however that these Articles may be extended to River or Streams, (eaux courantes) it is now a settled principle of jurisprudence that the *ouvrages apparents*, to be made by the party setting up the perspective rights, should have been made, not on his own land, but upon the land of the party against whom he sets up the prescription.

Court of Cassation, 8th February 1858.

DEVILLENEUVE, 1858 V. 1. Page 193.

Court of Colmar, 26th November 1857, Ibid. V. 2. Page 343.

Court of Paris, 15th May 1858, V. 2. page 477.

In the last of which cases the Court lays down the following rules, as governing the question of prescription:

" Considérant que le principe fondamental " de la prescription est la possession de la " chose d'autrui, que cette possession doit être " continue et non interrompue, paisible, pu- " blique, à titre de propriétaire, c'est-à-dire " que, par son objet et ses effets, elle doit être " un constant appel à la vigilance du propriétaire, et si elle se prolonge pendant un " temps, dont la durée se mesure à la bonne ou " mauvaise foi du possesseur, forme une in- " vincible présomption que le propriétaire a " délaissé le bien qui lui appartenait.

" Que l'usage de l'eau amenée par la pente " du sol ne peut avoir ce caractère. Qu'une " telle possession, en effet, n'embrassant que " la partie des eaux dont le fond supérieur " n'a pas besoin, peut autant moins contre- " dire le droit de propriété et se transformer " en cette appropriation exclusive qui consti- " tue la prescription, que le propriétaire su- " périeur n'a ni intérêt ni qualité pour con- " tester l'usage des eaux, quand par leurs " cours naturel, elles atteignent le fonds in- " férieur; qu'il s'en suit que l'existence d'ou- " vrage propres à faciliter la jouissance du " propriétaire inférieur, n'en change la nature " qu'autant qu'elle affecte le fonds supérieur, " et qu'autrement elle ne cesse pas d'être pré- " caire.

" Considérant troisièmement que les Ar- " ticles 686 et suiv. du Code Nap., confir- " ment cette doctrine; qu'il en résulte que la " prescription des servitudes qui peuvent s'ac-

" quérir par la possession a pour condition " nécessaire une entreprise directe sur les " terrains d'autrui, etc.

In the present case it is not pretended that any works, *ouvrages apparents*, have been constructed elsewhere than on Chauvin's own land, consequently assuming the above cited Articles of the Civil Code to apply to Rivers and Streams, *(eaux courantes)* there are no works in existence which could lay the foundation to a prescription right.

But if it were necessary for the decision of this case, which it is not, it might be shewn, by numerous decisions and by the opinion of every author who has written upon the subject, that Articles 641 and 642 of the Civil Code do not apply to *eaux courantes*. Under any circumstances, it is clear law that no prescription can be set up against a *Riverain* founded upon mere user of his rights to water, such right being purely facultative.

See Prudhon—Traité du Domaine Public, vol. 5, page 338 and 1435. DAVIEL, *Des cours d'eau*, vol. 2, page 132 and 583 ZACHARIÆ, by Massé et Vergé, vol. 2 page 165, No. 11 and the cases and authorities there cited.

I am therefore of opinion that the claim of Chauvin, founded upon grant and prescription, falls to the ground. The only remaining point to be noticed in Chauvins' claim is founded upon grant and estoppel. Chauvin says that the grant of water, having been made with the consent of all the Riverains and Lepoigneur being now in the rights of one of such Riverains, he is estopped from objecting to Chauvin's taking, without limitation or restriction, the waters of the River by his Canal at *Albion* Estate. Now, assuming the existence of estoppel, which is questionable, it would merely amount to this, that Lepoigneur would now be estopped from objecting to the exercise by Chauvin of his right to water, under and to the extent of the terms of the original grant; but it being admitted by Chauvin, that he now takes water in excess of the terms of the grant, the assent to the grant could not operate as an estoppel to an application, by Lepoigneur to limit Chauvin to the quantity of water to which he is entitled under such grant. It therefore appearing that Chauvin applied the water from his *prise d'eau*, not only to the purpose for which it was granted viz: the turning of a water mill, but also to purposes of irrigation.

I am of opinion that Lepoigneur, as a Riverain, has the right to ask, and that this Court should order, that the Surveyor General do examine and report what quantity of water is necessary to Chauvin for the purpose of turning the existing water mill at his Estate *Albion* (it being agreed between parties that the existing mill would require the same quantity of water as that mentioned in the grant,) and that Chauvin be for the future, restricted to such quantity of water, by placing at the mouth of his canal a stone pierced with the requisite aperture, or by such other means as the Surveyor General may recommend.

This disposes of the fourth of the points for argument. The only remaining point, viz: the question whether the claim of Lepoigneur, as one of the borderers, to have a share of water allotted to him, by this Court, (assuming the Court to have jurisdiction so to do) appears not to be disputed by Chauvin; as an abstract proposition he only objects to the grant being made in any way which may diminish the quantity of water now taken by him from the river, so long as his present supply of water be not diminished. Chauvin; does not appear to contest Lepoigneur's right as a borderer to have a share of water allotted to him.

But there is a question of considerable importance which arises incidently of this point. It appears that, from the situation of Lepoigneur's land, bordering on the River, it is not possible for him to take any share of water which may be allotted to him, directly from the River on to his land; he has therefore asked this Court to authorize him to take such share of water through the land of Chauvin, at " *Belle Vue* " by means of the canal " Belle Vue," alleging that he has now an acquired and vested right of servitude upon the land of " *Belle Vue* " for the passage of water on to his land, by means of the said Canal. Now I apprehend that however well disposed this Court may be to grant to Lepoigneur a share of water from this River, the Court will not feel disposed to decide the important question of servitude then raised by Lepoigneur.

Assuming that the Court has jurisdiction to decide this question, I am of opinion that it would be preferable, before making any definitive order, upon this matter, to refer this question, as to the existence of this servitude for the decision of the Supreme Court, under the provisions of Article 2 of Ordinance No. 13 of 1832.

JUDGMENT.

In Re.—*Lepoigneur v. Chauvin.*

The Board, concurring generally in the conclusions of the Queen's attorney, decrees as follows:

On the preliminary objection raised by M. H. Chauvin père, finds that the Board has

not jurisdiction to entertain that part of Lepoigneur's Petition, in which he prays the Board to allow him to take, from the River "*Belle Eau*" nine inches of water, alleged to belong to him, in virtue of a certain agreement between the former proprietress of Mr. Chauvin's Estate.

Quoad ultra.—Repels Mr. Chauvin's plea that the board has no jurisdiction in the matter of the 2 Petitions of Mr. Lepoigneur.

On the merits, finds that the quantity of water, to be taken by Mr. Chauvin, ought to be fixed according to the terms of the original concession by the Land Court, in favour of Seligny, dated 11th January 1776, and, in respect that both the parties before the Board consent that such quantity of water be measured as the quantity which will suffice to turn the water wheel of the sugar mill at present on Mr. Chauvin Estate of "*Albion*" in place of the wheel of a cotton mill as by the terms of the grant aforesaid, refers to the Government Surveyor to report on the quantity of water requisite for the said purpose of such sugar mill, and on the proper means of measuring on such quantity from the River "*Belle Eau.*"

Further finds that Mr. Lepoigneur should be allowed a supply of water (*prise d'eau*) proportionate to the wants of his Estate, the quantity to be reported on by the Government Surveyor, to whom reference is made for the purpose of reporting thereon.

Further finds that such water, for Mr. Lepoigneur's Estate, may be taken from part of the River where it passes through the Estate of "*Belle Vue,*" belonging to Mr. Chauvin, and may be conveyed to the property of Mr. Lepoigneur through Mr. Chauvin's grounds, provided Mr. Lepoigneur can establish a right of servitude or otherwise at such passage thereof; and, in respect that the Board does not think proper to decide on the said question of right of passage, the Board does hereby refer the matter to the Supreme Court for the purpose of determining whether Mr. Lepoigneur, by himself for his predecessors, has acquired a right of leading water from the River "*Belle Eau*" to their Estate in "*Petite Rivière,*" through or over the lands of "*Belle Vue*" belonging to Mr. Henri Chauvin Père.

True Extract.

(Signed) CHARLES EDMUNDS BANKS.

Secretary to the Council and

Registrar of the Land Court.

ALPHABETICAL LIST OF MATTERS.

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ALPHEBETICAL LIST

OF CASES REPORTED IN THE COLLECTION OF 1862.

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ALPHEBETICAL LIST

OF CASES REPORTED IN THE COLLECTION OF 1862.

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A LIST

OF

THE SUGAR ESTATES

AND

PLANTATIONS CONCERNED IN THIS SECOND AND IN THE FIRST VOLUMES.

SHIPPING.